

1                   UNITED STATES DISTRICT COURT  
2                   SOUTHERN DISTRICT OF FLORIDA  
3                   WEST PALM BEACH DIVISION  
4                   CASE NO. 16-CV-80655-ROSENBERG

5                   **JAMES TRACY,** .

6                   Plaintiff, .

7                   vs. .

8                   **FLORIDA ATLANTIC UNIVERSITY : West Palm Beach, Florida**  
9                   **BOARD OF TRUSTEES,** November 30, 2017

10                  Defendant. .

11                  VOLUME 2  
12                  JURY TRIAL PROCEEDINGS  
13                  BEFORE THE HONORABLE ROBIN L. ROSENBERG  
14                  UNITED STATES DISTRICT JUDGE

15                  APPEARANCES:

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1                   *THE COURT:* Good morning, everyone. I do apologize, I  
2 told you to get here at 8:30, and we had some traffic issues  
3 this morning. But I was going to bring our jurors in and read  
4 the preliminary instructions and allow you to go into opening.

5                   I don't really want to take up matters right now  
6 unless it is something that affects the preliminary  
7 instructions or opening statements. I want to bring the jurors  
8 in.

9                   ~~MR. LEO:~~ Louis Leo. We would ask permission to move  
10 freely about the courtroom.

11                  *THE COURT:* The only issue with that, it is important  
12 to be near a podium with the microphone. There are two  
13 podiums, you can go between the two podiums. It is important,  
14 because it is a big courtroom, that Mrs. Stipes gets  
15 everything. Staying with the microphone would be the best.

16                  ~~MR. LEO:~~ I would ask if we could invoke the Rule at  
17 this time.

18                  *THE COURT:* I am happy to invoke the Rule if you are  
19 requesting that. All counsel should notify your witnesses that  
20 they should not be in the courtroom before they testify and do  
21 not discuss the testimony they have given with anyone after  
22 they have testified.

23                  The parties can remain in. Is there anyone who is  
24 being asked to stay in as an exception to the rule for any  
25 particular reason? Sometimes experts are requested to stay in

1           the courtroom.

2           MS. GRIFFIN: Holly Griffin. Diane Alperin is listed  
3       on the witness list, but she is the designated corporate  
4       representative.

5           THE COURT: Right, she should be here.

6           MR. LEO: She is a testifying witness as well, there  
7       are a lot of people there.

8           THE COURT: If she is the corporate rep she is allowed  
9       to be here.

10          MR. LEO: We don't ask that -- they can't discuss the  
11       witnesses' testimony or what happens.

12          THE COURT: Absolutely, nobody can discuss the  
13       testimony with anyone else, yes, that is a requirement and  
14       counsel should make sure all of the witnesses know that.

15          MR. MEDGEBOW: Joel Medgebow. Yesterday, we went over  
16       Plaintiff's 58, the Court overruled the objection and asked if  
17       we could find the top of the email. I have it right here, if I  
18       may approach.

19          THE COURT: Hold on to it, that is fine. I am  
20       assuming you all worked that out. I appreciate you looking for  
21       it and finding it. That will help, I know that was a concern  
22       to the Defense. Okay.

23          MR. FEICHT: Roger Feicht. One thing will impact  
24       opening, counsel for Plaintiff advised us they object to us  
25       referring to or referencing exhibits that the Court overruled

1       objections to last night in the opening statement.

2             *THE COURT:* If I overruled an objection -- if I  
3       overruled an objection -- let me make sure I am saying this  
4       clearly. If I overruled an objection, it may be referred to.

5             *MR. BENZION:* The objection is not to making reference  
6       to it, it is the actual use and publication to the jury. We  
7       were provided a list of exhibits and led to believe these are  
8       going to be shown during the opening and some of those, there  
9       are hearsay objections, despite relevance issues --

10          *THE COURT:* Let's not show exhibits to the jurors  
11       during opening.

12             You all had so many problems with your exhibits, can  
13       you give your openings without showing documents?

14          *MR. CURLEY:* I cannot.

15          *THE COURT:* I am going to bring the jury in.

16          *MR. CURLEY:* We are talking about the collective  
17       bargaining agreement, the heart of our case, I can't --

18          *THE COURT:* I will bring the jury in and go through  
19       the preliminary instructions. I will leave it to counsel to  
20       present the opening statements properly, consistent with the  
21       rulings. I am confident your team made you aware of all of the  
22       rulings last night, so let's bring the jury in.

23          *MR. BLICKENSDERFER:* Your Honor, in the preliminary  
24       instructions -- the statement --

25          *THE COURT:* You need to work together, you need to

1 find accommodation so this trial can be presented in a smooth  
2 manner with the least disruption possible. I will carve out  
3 time to take up issues. I spent a lot of time last night, now  
4 it is the jury's time.

5 (Thereupon, the jury returned to the courtroom).

6 THE COURT: Welcome back, everyone. Is this the best  
7 way for seating? All right. You may be seated. Nice to see  
8 everyone this morning.

9 Members of the jury, now that you have been sworn I  
10 need to explain some basic principles about a civil trial and  
11 your duty as jurors. These are preliminary instructions, I  
12 will give you more detailed instructions at the end of the  
13 trial.

14 It is your duty to listen to the evidence, decide what  
15 happened and apply the law to the facts. It is my job to apply  
16 the law that you are to apply, and you must follow the law even  
17 if you disagree with it. You must decide the case only on the  
18 evidence presented in the courtroom.

19 Evidence comes in many forms. It can be testimony  
20 about what someone saw, heard or smelled. It can be an exhibit  
21 or a photograph. It can be someone's opinion.

22 Some evidence may prove a fact indirectly. Let's say  
23 a witness saw wet grass outside and people walking into the  
24 courthouse carrying a wet umbrella. This may be indirect  
25 evidence that it rained, even though the witness didn't

1 personally see it rain. Indirect evidence like this is also  
2 called "circumstantial evidence" - simply a chain of  
3 circumstances that likely proves the fact.

4 As far as the law is concerned, it makes no difference  
5 whether evidence is direct or indirect. You may choose to  
6 believe or disbelieve either kind. Your job is to give each  
7 piece of evidence whatever weight you think it deserves.

8 During the trial you will hear certain things that are  
9 not evidence, and you must not consider them.

10 First, the lawyers' statements and arguments are not  
11 evidence. In their opening statements and closing arguments  
12 the lawyers will discuss the case. Their remarks may help you  
13 follow each side's arguments and presentation of evidence. But  
14 the remarks themselves are not evidence and shouldn't play a  
15 role in your deliberations.

16 Second, the lawyers' questions and objections are not  
17 evidence. Only the witness' answers are evidence. Don't  
18 decide that something is true just because a lawyer's question  
19 suggests that it is. For example, a lawyer may ask a witness,  
20 you saw Mr. Jones hit his sister, didn't you? That question is  
21 not evidence of what the witness saw or what Mr. Jones did,  
22 unless the witness agrees with it.

23 There are rules of evidence that control what the  
24 Court can receive into evidence. When a lawyer asks a witness  
25 a question or presents an exhibit, the opposing lawyer may

1       object if he or she thinks the rules of evidence don't permit  
2       it. If I overrule the objection, then the witness may answer  
3       the question or the Court may receive the exhibit. If I  
4       sustain the objection, then the witness cannot answer the  
5       question, and the Court cannot receive the exhibit. When I  
6       sustain an objection to a question, you must ignore the  
7       question and not guess what the answer might have been.

8                 Sometimes I may disallow evidence, this is also called  
9       "striking evidence", and order that you disregard it or ignore  
10      it. That means that you must not consider the evidence when  
11      deciding the case.

12               I may allow some evidence for only a limited purpose.  
13      When I instruct you that I have admitted an item of evidence  
14      for a limited purpose, you must consider it only for that  
15      purpose and no other.

16               To reach a verdict, you may have to decide which  
17      testimony to believe and which testimony not to believe. You  
18      may believe everything a witness says, part of it, or none of  
19      it. When considering a witness' testimony, you may take into  
20      account; the witness' opportunity and ability to hear, see, or  
21      know the things the witness is testifying about; the witness'  
22      memory; the witness' manner while testifying; any interest the  
23      witness has in the outcome of the case; any bias or prejudice  
24      the witness may have; any other evidence that contradicts the  
25      witness' testimony; the reasonableness of the witness'

1       testimony in light of all of the evidence; and any other  
2       factors affecting believability.

3                 At the end of the trial, I will give you additional  
4       guidelines for determining a witness' credibility.

5                 This is a civil case. To help you follow the  
6       evidence, I'll summarize the parties' positions.

7                 Professor Tracy has the burden of proving his case by  
8       what the law calls a "preponderance of the evidence." That  
9       means Professor Tracy must prove that, in light of all the  
10      evidence, what he claims is more likely true than not. So, if  
11      you could put the evidence favoring Professor Tracy and the  
12      evidence favoring FAU on opposite sides of balancing scales,  
13      Professor Tracy needs to make the scales tip to his side. If  
14      Professor Tracy fails to meet this burden, you must find in  
15      favor of FAU.

16                 To decide whether any fact has been proven by a  
17       preponderance of the evidence, you may, unless I instruct you  
18       otherwise, consider the testimony of all witnesses, regardless  
19       of who called them, and all exhibits that the Court allowed,  
20       regardless of who produced them.

21                 After considering all of the evidence, if you decide a  
22       claim or fact is more likely true than not, then the claim or  
23       fact has been proved by a preponderance of the evidence.

24                 On certain issues, called "affirmative defenses," FAU  
25       has the burden of proving the elements of a defense by a

1 preponderance of the evidence. I will instruct you on the  
2 facts FAU must provide for any affirmative defense. After you  
3 consider all of the evidence, if you decide that FAU has  
4 successfully proven that the required facts are more likely  
5 true than not, the affirmative defense is proved.

6           While serving on the jury, you may not talk with  
7 anyone about anything related to the case. You may tell people  
8 you are a juror and give them information about when you must  
9 be in court, but you must not discuss anything about the case  
10 itself with anyone.

11           You shouldn't even talk about the case with each other  
12 until you begin your deliberations. You want to make sure you  
13 have heard everything, all the evidence, the lawyers' closing  
14 arguments, and my instructions on the law. Before you begin  
15 deliberating. You should keep an open mind until the end of  
16 the trial. Premature discussions may lead to a premature  
17 decision.

18           In this age of technology, I want to emphasize that  
19 in addition to not talking face-to-face with anyone about the  
20 case, you must not communicate with anyone about the case by  
21 any other means. This includes emails, text messages and the  
22 Internet, including social-networking websites such as  
23 Facebook, MySpace, and Twitter.

24           You also should not Google or search online or off  
25 line for any information about the case, the parties, or the

1 law. Don't read or listen to the news about this case, visit  
2 any places related to this case, or research any fact, issue or  
3 law related to this case. The law forbids the jurors to talk  
4 with anyone else about the case and forbids anyone else to talk  
5 to the jurors about it.

6 It is very important that you understand why these  
7 rules exist and why they are so important.

8 You must base your decision only on the testimony and  
9 other evidence presented in the courtroom. It is not fair to  
10 the parties if you base your decision in any way on information  
11 you acquire outside the courtroom.

12 For example, the law often uses words and phrases in  
13 special ways, so it is important that any definitions you hear  
14 come only from me and not from any other source. Only you  
15 jurors can decide a verdict in this case. The law sees only  
16 you as fair and only you have promised to be fair, no one else  
17 is so qualified.

18 If you wish, you may take notes to help you remember  
19 what the witnesses said, and I see -- do you have your  
20 notepads? Yes, you have your notepads and pencils. If you do  
21 take notes, please don't share them with anyone until you go to  
22 the jury room to decide the case. Don't let note-taking  
23 distract you from carefully listening to and observing the  
24 witnesses. When you leave the courtroom, you should leave your  
25 notes hidden from view in the jury room.

1           Whether or not you take notes, you should rely on your  
2 own memory of the testimony. Your notes are there only to help  
3 your memory. They are not entitled to greater weight than your  
4 memory or impression about the testimony.

5           Let's walk through the trial. First, each side may  
6 make an opening statement, but they don't have to. Remember,  
7 an opening statement is not evidence, and it is not supposed to  
8 be argumentative; it is just an outline of what the parties  
9 intend to prove.

10          Next, Professor Tracy will present his witnesses and  
11 ask them questions. After Professor Tracy questions the  
12 witness FAU may ask the witness questions, this is called  
13 cross-examining the witness. Then FAU will present its  
14 witnesses and Professor Tracy may cross-examine them. You  
15 should base your decision on all of the evidence regardless of  
16 which party presented it.

17          After all the evidence is in, the parties' lawyers  
18 will present closing arguments to summarize and interpret the  
19 evidence for you, and then I will give you instructions on the  
20 law and you will go to the jury room to deliberate.

21          I did want to mention, the parties have agreed,  
22 because some of the witnesses are witnesses that both parties  
23 want to call -- I do want to let you know that each party has a  
24 right to call witnesses to prove its case. The witnesses that  
25 you will hear from, some of them, and I will let you know which

1       ones those are, have been called by both parties, and in the  
2       interest of time as to those witnesses who both parties wanted  
3       to call, the parties have agreed to call the witness only once  
4       rather than calling them in one case and then in another case,  
5       Plaintiffs case and defense case.

6                 If a witness is recalled a second time, it would be  
7       for a limited purpose, it wouldn't be to repeat what the  
8       witness said. There might be some limited issues that would  
9       necessitate the witnesses being called back a second time for a  
10      limited purpose.

11                You may hear the attorney say she is about to conduct  
12      direct or cross-examination. You can disregard those remarks  
13      as those are meant to aid the Court and counsel, and you should  
14      pay attention to what the witness has to say as you would for  
15      any other witness.

16                I will read that instruction again before each witness  
17      both sides intended to call. I want you to know that is how we  
18      will proceed with several witnesses.

19                With that, I will turn it over to counsel for your  
20      opening statements. And the Plaintiff, if you care to give an  
21      opening statement, can go first, and I will just notify you  
22      when the time has run that you have allotted for your opening  
23      statement.

24                *MR. BENZION:* Yes, your Honor, thank you.

25                *THE COURT:* I will remind counsel, as I reminded the

1       jurors, it is not argument, it is an outline of what the  
2       evidence will show.

3                  *MR. BENZION:* Yes, your Honor.

4       Members of the jury, on this day, and on every day,  
5       the First Amendment to the United States Constitution gives a  
6       Government employee the right to the freedom of speech, and the  
7       freedom to exercise that right without being retaliated against  
8       by its Government employer.

9       That is what this case is about, a Government employer  
10      that retaliated against the employee for the free speech  
11      exercised by that employee.

12       Members of the jury, I am so grateful for this  
13      opportunity to speak to you this morning in this United States  
14      District Court in this trial in which I am representing the  
15      Plaintiff, Dr. James Tracy.

16       As you know, this is not a task I am handling on my  
17      own; I have the help of these fine gentlemen, my co-counsel,  
18      Mr. Leo, and Mr. Medgebow with the Coalition, and Mr.  
19      Blickensderfer.

20       We are representing Dr. Tracy, and you will learn he  
21      is a resident of Boca Raton and he has four children and he is  
22      married to a librarian at the university he used to work at.

23       You are going to learn that Dr. Tracy has a Ph.D. in  
24      mass communications. You will learn that Dr. Tracy was a  
25      former tenured professor at Florida Atlantic University. You

1 will learn what tenured means, the importance of being a  
2 tenured professor. That means you have a lifetime employment  
3 in your job, and that job can only be taken away from you for  
4 just cause, just cause.

5 In this case, the evidence will show you Dr. Tracy's  
6 job was taken from him unjustly.

7 Who is the Defendant in this case? Florida Atlantic  
8 University, a public institution, which means they are a  
9 Government institution, and that has significance. Because  
10 they are a Government institution, that means the United States  
11 Constitution applies to them. They must uphold the United  
12 States Constitution, including the First Amendment, and in this  
13 trial the Defendant university is going to claim certain  
14 things. The claims are not true.

15 In this trial, you will see that Florida Atlantic  
16 University is a place with two sets of rules; one set of rules  
17 for people whose speech they agree with, and another set of  
18 rules for people whose speech they do not agree with, like Dr.  
19 Tracy.

20 Now, the story of the trial begins in late 2012. We  
21 talked about it yesterday, but in case you don't remember, in  
22 December 2012, the Sandy Hook school shooting incident  
23 occurred.

24 Again, if you don't remember, this was a mass shooting  
25 that took place at an elementary school in Newtown,

1 Connecticut, that event made national news and it was a big  
2 deal in this country. And the evidence will show in this trial  
3 that shortly after that event, Dr. Tracy began blogging about  
4 it. Let me talk to you a moment about what a blog is.

5 In this trial, you will learn a blog is a place online  
6 where you express your comments, your ideas, your opinions,  
7 your thoughts, your speech about whatever you want to express  
8 about. In Dr. Tracy's case, he expressed his thoughts,  
9 opinions, his speech about the Sandy Hook incident.

10 Dr. Tracy questioned whether it actually took place.  
11 Dr. Tracy questioned whether anyone actually died there, and  
12 Dr. Tracy questioned whether the U.S. Government and the media  
13 were telling the truth to the people about the incident. And  
14 the evidence will show you that this was an unpopular thing to  
15 do.

16 It was controversial speech, and to some the speech  
17 was even offensive. And the evidence will show you there was a  
18 reaction to Dr. Tracy's speech, there was a reaction in the  
19 media and community. The evidence will show you that the media  
20 began to cover Dr. Tracy's speech and not in a positive light.

21 The evidence will show you that there were complaints  
22 in the community about Dr. Tracy's blog speech, that students  
23 complained about Dr. Tracy's speech to the Defendant  
24 university; that faculty at the Defendant university complained  
25 about Dr. Tracy's speech; that alumni of the university and

1       donors to the Defendant university complained about Dr. Tracy's  
2       blog speech and urged the university to fire Dr. Tracy for his  
3       speech.

4                 And so, naturally, as the evidence will show you, the  
5       Defendant university began to hold meetings, closed door  
6       meetings, with top administration officials where they planned  
7       their response to the uproar caused by Dr. Tracy's speech.

8                 What response did they plan?

9                 The evidence will show you the only response that the  
10      Defendant university had to Dr. Tracy's speech was to find a  
11      way to discipline him, that was their reaction.

12                 Now, they will claim the reasons they disciplined him  
13      were legitimate, they didn't have to do with Dr. Tracy's  
14      speech, but the evidence in the trial will show you that the  
15      claims are not true. The evidence in the trial will show you  
16      the reasons they offered to discipline Dr. Tracy were  
17      pretextual and pretext.

18                 Pretext means the stated reason for doing something is  
19      not the real reason, and in this trial, the Defendant  
20      university's stated reason for disciplining Professor Tracy is  
21      not the real reason. As Professor Tracy claims, it had to do  
22      with his speech and disliking and detesting of his speech.

23                 So, emerging from these meetings in 2013 with their  
24      plan to discipline Professor Tracy, they accused Professor  
25      Tracy of not complying with policies of the university.

1                   The evidence will show you Professor Tracy responded  
2 that he was complying with the policies, but the Defendant  
3 university disciplined him anyway, while acknowledging that he  
4 was complying with the policies, but just not good enough for  
5 them, not in the way they wanted.

6                   Is this the way they responded to other professors?  
7 The evidence will show you no, it is not. Other professors  
8 whose speech they didn't have a problem with, they would not  
9 have responded like that. That is what the evidence will show  
10 you in this trial.

11                  And then FAU used that discipline, they used it to  
12 extract an agreement from Dr. Tracy. You are going to see this  
13 agreement. The Defendant university agreed to withdraw the  
14 discipline the first time Professor Tracy was disciplined, by  
15 the way, two months after the controversial speech. In 11  
16 years at the university, he was never before disciplined until  
17 two months after the controversial speech.

18                  The evidence will show you the only way that the  
19 Defendant university was willing to withdraw this unjust  
20 discipline against Dr. Tracy is if he would agree to use a  
21 disclaimer on his writing that the Defendant university drafted  
22 for him, and what you will learn is that there are no other  
23 faculty at the university who have to use a disclaimer drafted  
24 by the university on their speech.

25                  Another condition of settling that discipline of 2013,

1 and withdrawing it from Professor Tracy's file was that  
2 Professor Tracy would be restricted from ever referring to  
3 himself as a professor in any of his online writings, not just  
4 a professor at FAU, generally, he could not call himself a  
5 professor any more in his online writings. And professor Tracy  
6 wanted his discipline removed from his record, and he agreed to  
7 comply with the settlement agreement, he agreed to comply with  
8 the requests.

9                 The evidence will show you that later the Defendant  
10 university never removed that discipline from the file and kept  
11 it in there, and then produced it to the media after he was  
12 fired.

13                 That wasn't the end of the retaliation that Professor  
14 Tracy faced in 2013. You will also learn Professor Tracy had  
15 an approved course at the university that was abruptly canceled  
16 in 2013, and you will also learn that Professor Tracy usually  
17 worked in the late afternoons and evenings because he provided  
18 his own child care for his own children. And then in 2013,  
19 after the controversial speech, his schedule changed and he was  
20 working during the days and had to find new child care  
21 accommodations.

22                 This is the experience of Professor Tracy in 2013.  
23 That was not the end of the retaliation, it continued in 2015.  
24 There was a lot going on in 2015, the evidence will show you,  
25 there was a policy, it is called conflict of interest outside

1       activities policy, part of the collective bargaining at Florida  
2       Atlantic University, and a lot of other regulations and  
3       policies.

4                  What that will tell you, it is confusing, it is not  
5       clear, you are going to learn it is sometimes called the  
6       outside employment policy or the outside income policy or  
7       outside business or professional activity policy instead of  
8       outside activity policy, and you will see why there is so much  
9       confusion about this policy.

10                 By the way, this is not confusion that only Dr. Tracy  
11      had about the policy, this is confusion by others at the  
12      university about the policy. Other faculty at the university  
13      were confused how this policy worked, and what sort of  
14      activities needed to be disclosed to the Defendant university  
15      under this policy.

16                 They were confused. The evidence is going to show you  
17      that. Not only were faculty confused, administrators were  
18      confused about the policy. Administrators tasked with  
19      enforcing the policy themselves did not fully understand how  
20      this policy was supposed to work.

21                 And with that context in the fall of 2015, the  
22      confusion known by the Defendant university at that time, the  
23      evidence will show you that the Defendant university used that  
24      confusion against Dr. Tracy to mislead him and track him and  
25      make it look as if he wasn't complying with it.

1           I am going to explain that.

2           In around September or October 2015, to his superiors  
3 Dr. Tracy expressed his confusion about the policy, and the  
4 evidence will show you he sought clarification from his  
5 superiors, please help me comply with the policy. The evidence  
6 will show you that. Before they offered an explanation as to  
7 how Professor Tracy should comply with the policy, before they  
8 ever gave him an inkling of what he needed to do to satisfy  
9 their desires, they disciplined him for his alleged  
10 non-compliance with the policy.

11           In response to the discipline, the evidence will show  
12 you, in response to the discipline, Professor Tracy said he was  
13 looking for clarification, and he felt he was being disciplined  
14 for simply asking for clarification.

15           Did the Defendant university give him the  
16 clarification? Did they help Professor Tracy comply with the  
17 policy? The evidence will show you they did not.

18           The evidence will show you that behind closed doors  
19 they joked about Professor Tracy's request for clarification,  
20 and they never intended to give it to him. And before they  
21 ever gave him any clarification, something happened.

22           The evidence will show you there was another public  
23 outlash about Professor Tracy's blogging that garnered  
24 attention, and the evidence will show you that within hours of  
25 that public complaint about Professor Tracy's blogging, the

1      Defendant university made a decision to terminate him, within  
2      hours of the complaints about his speech.

3            What the Defendant university knew, they could not  
4      terminate Professor Tracy for his speech, so they conducted a  
5      pretextual charade.

6            The evidence will show you they made it seem as if  
7      Professor Tracy could do something to keep his job, but you  
8      will see that there was nothing Professor Tracy could do, that  
9      as he tried to comply, they would always move the goalpost.

10          The evidence will show you that when Professor Tracy  
11     sought clarification, the Defendant university misled him, they  
12     gave him vague instructions so that when he would try to  
13     comply, they would say that is not what we wanted. That is  
14     what the evidence is going to show you.

15          Instead of telling him what they wanted and giving him  
16     a chance to give it to them, they fired him, even though they  
17     didn't know he didn't know what they wanted, for not disclosing  
18     a blog to them that they knew about and could have told him  
19     that they wanted to see it on a form, and the first time that  
20     they ever told him that that is what they wanted was when they  
21     terminated him for not putting it on the form, the first time.

22          Would they do that to other professors, other faculty  
23     members? The evidence will show you they wouldn't, two sets of  
24     rules, and they didn't agree with Professor Tracy, so he didn't  
25     get that courtesy from them.

1           In not giving a constructive advice on how to comply  
2 with the rules, the evidence will show you the Defendant  
3 university departed from their own policies and procedures.  
4 The evidence will show you that they were required to help the  
5 professor comply with the rules, the discipline is supposed to  
6 be constructive, and they didn't do that.

7           And the evidence will show you that is because they  
8 didn't want him to comply with the rules, they didn't want him  
9 to give them what they wanted, they wanted to have a pretext to  
10 fire him. And ultimately, that is what they did, they  
11 terminated Professor Tracy.

12           Now, Dr. Tracy is going to take the stand in the case,  
13 members of the Defendant university are going to take the stand  
14 and everybody is going to give their testimony and tell you  
15 their version of the events of what happened in this case.

16           When Dr. Tracy testifies, you will have an opportunity  
17 to observe him, see how he thinks, and you will see he is a  
18 serious person who took his rights and obligations at the  
19 defendant university seriously.

20           You are going to see when the Defendant university's  
21 witnesses take the stand that they did not take Professor  
22 Tracy's rights seriously.

23           When these people are testifying, you are going to  
24 have the duty to assess their credibility, and in doing so, you  
25 are going to see what a credible witness Professor Tracy is and

1 how the testimony of the administrators at the Defendant  
2 university is not credible and not supported by the evidence in  
3 this case.

4                 Members of the jury, as you know, you are serving an  
5 incredibly important function in this case. In this trial  
6 system we need you, you are here in this case to serve justice,  
7 and at the end of this trial, when all of the evidence is  
8 before you and you have heard all of the testimony in this  
9 case, you are going to see how unfairly Dr. Tracey was treated.  
10 You are going to see that his termination was not just cause.

11                 You are going to come to the inevitable conclusion  
12 that serving justice in this case can only be done by rendering  
13 a verdict for the Plaintiff, Dr. James Tracy.

14                 Thank you so much for your attention.

15                 *THE COURT:* Okay, from the defense in opening  
16 statement.

17                 *MR. CURLEY:* Yes, your Honor. Could I have a moment  
18 to set up, please?

19                 *THE COURT:* Yes.

20                 *MR. MEDGEBOW:* Your Honor, before Mr. Curley begins,  
21 what we discussed regarding the exhibits.

22                 *THE COURT:* I will let Mr. Curley present his opening.  
23 If there are any objections, make the objections known.

24                 The Court has made its rulings and counsel should  
25 follow the rulings.

1                   MR. MEDGEBOW: Thank you, your Honor.

2                   MR. CURLEY: I know I am going to have trouble, sorry,  
3 folks.

4                   May it please the Court, counsel.

5                   Yesterday, during the jury selection, somebody was  
6 asked if they heard about the case, I don't remember who it  
7 was, but somebody was asked if they heard about the case, and  
8 they said not a whole lot, but they did know that a professor  
9 lost his job, and they said they wanted to know the reason why.

10                  That is a good question, a fair question, and I am  
11 here to tell you.

12                  The reason Professor Tracy lost his job is because  
13 Professor Tracy doesn't follow the rules. He doesn't think the  
14 rules apply to him. You will hear about an agenda that  
15 Professor Tracy had. We will take you through all of that, and  
16 you will be up to speed. That is our job, our team's job.

17                  You will hear that the decision -- when counsel talks  
18 about they did this and they did that, we all know we are  
19 talking about people. It might be FAU, might be a state school  
20 that has 30,000 students, 3300 faculty, but we are talking  
21 about people who made the decision.

22                  So, during the course of the case you will meet --  
23 there are two folks that did this. One of them is Vice Provost  
24 Diane Alperin, she will be here for the whole case, she was the  
25 top decision maker. She will sit in the stand and look you in

1       the eye and tell you about the frustration she had with  
2 Professor Tracy and how time after time after time the decision  
3 had to be made. You will get all that.

4                  Another person you will hear about is Dean Heather  
5 Coltman. Dean Coltman works below Vice Provost Alperin, and  
6 she is the one who spent a lot of time trying to get Professor  
7 Tracy to comply with his obligations.

8                  So, here is the deal. He was tenured faculty, and  
9 when you are tenured faculty, any faculty really at an  
10 institution like FAU, you get freedoms, but with freedoms come  
11 responsibilities. The expectation is that you will follow your  
12 responsibilities, the expectation is that we can trust you.

13                  You will hear a lot during the course of the trial  
14 about an honor system. 3300 employees, folks, they can't watch  
15 them all, they can't keep an eye on everybody. So, what they  
16 ask, particularly people who are faculty members, is just to be  
17 honorable, meet the highest ethical standards. That is in the  
18 collective bargaining agreement, that will be the rules of the  
19 road here. And what you will see is that Professor Tracy  
20 failed time and time again to honor his obligations.

21                  What you will see is that Professor Tracy decided  
22 those rules don't apply to me, I have other things I need to  
23 do, outside activities. You are going to hear about blogs,  
24 about books, podcasts. All this stuff, by the way, was not  
25 part of the job, his job was to teach at FAU.

1           He talked about culture, conspiracy, media studies,  
2 but we'll hear a lot about things that weren't a part of his  
3 job. That is part of the issue here.

4           When you are a full-time tenured faculty at FAU that  
5 should be your highest calling, that should be what you give  
6 your priority, that ought to be what you spend enough time on  
7 to do your job right. Those are issues that the university was  
8 asking.

9           Normally you fill out forms and there is a procedure  
10 for that. 3300 employees, you have to walk through forms, you  
11 have to have people comply, you have to have people disclose to  
12 you so you can assess those things. You can't go chase  
13 everybody. If you have to chase everybody, you can't do your  
14 job either.

15           You will hear from Dean Coltman that was her job, she  
16 was responsible for getting these things in, and Professor  
17 Tracy time and time and time again refused to do it. So, let's  
18 talk about what he didn't do.

19           There is another page coming.

20           Let's start with this one.

21           MR. LEO: Your Honor, objection. This is not an  
22 exhibit.

23           THE COURT: I can't hear you. What is the objection?

24           MR. LEO: This is not an exhibit.

25           THE COURT: Is it being used for demonstrative

1 purposes?

2 MR. CURLEY: It is.

3 THE COURT: You may proceed.

4 MR. CURLEY: Okay, folks, this is a list of things  
5 Professor Tracey was supposed to do that he did not do. This  
6 list runs three years.

7 He solicited money for independent research on his  
8 memorable blog, that is the blog counsel is talking about,  
9 never disclosed it. I will show you the collective bargaining  
10 agreement in a minute. It tells you that you are supposed to  
11 disclose that, more than a thousand dollars in compensation  
12 through money solicited by him for his blog. He did not  
13 disclose that he was engaged in a compensated activity.

14 You will see the forms. Remember counsel said he  
15 submitted forms? You are going to see those. In the forms  
16 there is a box you check, did I get money, didn't I. If you  
17 get money, you check the box. I guarantee you Professor  
18 Tracy's boxes are not checked, ever.

19 He performed enough research and analysis to draft and  
20 publish articles, one to two articles a week on his memory hold  
21 blog website for an audience of over 10,000 followers, no  
22 disclosure. I will show you in a minute and show you the  
23 collective bargaining agreement. Why is that important? When  
24 you are talking about a conflict of interest and outside  
25 activities, there is a conflict of commitment. If you can't do

1 your job at FAU, or we don't know you can't do your job, that  
2 is a conflict of interest that the university has to deal with.

3                   What you will see in the collective bargaining  
4 agreement, the way it works is you disclose these things. No  
5 one says you can't do it. You have to disclose it and then you  
6 talk about it, and you will see that in the collective  
7 bargaining agreement, it says you are supposed to tell your  
8 supervisor about it and then you can work through it. If you  
9 don't tell your supervisor, you can't work through it, can you?

10                  Let's see. He performed enough research and analysis  
11 to draft and publish 13 articles in a single month, that was  
12 January, that is the month after the Sandy Hook massacre. No  
13 disclosure. He engaged in research and writing articles as  
14 part of the outside activities using university resources. No  
15 disclosure. Let me stop there.

16                  FAU is a state run school owned by the Government, not  
17 Mr. Tracy. When you use their resources, probably like any  
18 job, you have to ask permission. You just can't use the stuff  
19 without asking if it is okay if you are using it for things  
20 that are personal.

21                  Professor Tracy claims this is all his stuff. I have  
22 constitutional rights, you shouldn't be able to interfere with  
23 that, this is personal to me.

24                  Well, if that is true, then you ought not be using the  
25 university's resources without asking them. Those belong to

1       the state, to the university, they are for the students, not  
2       for the professors to use privately.

3                 If you disclose that, that is okay, you can do it.  
4       You will see the forms.

5                 Last, he used university resources to produce and  
6       record a program called Real Politics, it is a podcast. He did  
7       that without disclosure. And then, finally, on 12/15, that is  
8       the day of his -- the day that they gave notice of his  
9       termination, he disclosed that he had been using university  
10      resources. Although you will see documents that he was giving  
11      to Dean Coltman and others saying he never used resources and  
12      never used anything of the university, here he reveals he had  
13      been using things even though he never told him he ever did.

14                 High ethics, folks.

15                 Next page.

16                 He contributes 120 pages of material to a book called  
17      Nobody Died at Sandy Hook, that was on sale on Amazon.com in  
18      November 2015. He markets the book and says it is engaged in  
19      brisk sales, his words. You will see the evidence, you will  
20      see his marketing pieces. He failed to disclose contribution  
21      to the book where he received or will receive compensation from  
22      it.

23                 He used the name FAU and his professional position as  
24      a professor for what he later claimed are outside activities.

25                 If these are outside personal activities, why are you

1 dragging the university into it? Why would you suggest this is  
2 something the university sponsors or is behind?

3 He did this repeatedly and counsel told you about an  
4 agreement. I don't want to get in trouble here.

5 Counsel told you about an agreement. There was an  
6 agreement, it is in 2013. I will talk about it in a minute.

7 I knew that was going to happen, that was for dramatic  
8 effect.

9 It was in 2013. What he did is he agreed he would not  
10 use the university's name and he would not use his professional  
11 title.

12 They told him you can publish whatever you want, you  
13 can blog to your heart's content, but keep it personal and  
14 don't drag the university into it.

15 He agreed to that, signs an agreement to that effect,  
16 and the agreement was, we will take the discipline away. He  
17 had been disciplined for doing it. We will take the discipline  
18 away but be good, don't drag the university into the Sandy Hook  
19 things or anything else. You can do your personal stuff, but  
20 don't bring the university into it.

21 You will see in this case in the book -- in the book  
22 that has the brisk sales in November that he never told anybody  
23 about, it states "James Tracy, Associate Professor in the  
24 school" --

25 MR. LEO: Objection.

1           THE COURT: Basis.

2           MR. LEO: Hearsay.

3           THE COURT: Response.

4           MR. CURLEY: This is his book, it has been  
5 authenticated, your Honor.

6           THE COURT: Is this one of the objected to exhibits  
7 that has not been ruled on?

8           MR. LEO: Yes, your Honor.

9           THE COURT: Okay. Do not refer to the exhibit and  
10 continue with what the evidence will show.

11          MR. CURLEY: Thank you, your Honor.

12          Suffice it to say that when you see the book, what you  
13 will see is that Professor Tracy talks about his job at FAU and  
14 what he does, and everything you will see in this suggests to  
15 you that this is a book FAU is behind and sponsored. FAU has  
16 30,000 kids going there, 3300 faculty. They cannot allow  
17 people, whether it is Professor Tracy or anybody else, to go  
18 out and publish things on their behalf, not without their  
19 consent and authorization. He does that time and time again.

20          He was the only FAU professor to refuse -- this is  
21 crucial to the case -- he was the only FAU professor to refuse  
22 to click the "okay" on the pop-up box that requires the he  
23 acknowledge his obligations under the outside activities  
24 policy. What is that about?

25          In 2014, there is an audit done at FAU, it has nothing

1 to do with Professor Tracy, it has something to do with the  
2 engineers and the fact that they are designing products and  
3 they are not making the proper disclosures to the university.  
4 So the Inspector General, that is the accounting department for  
5 FAU, comes out and says, look, you folks need to do a better  
6 job with conflict of interest. We need to make sure people are  
7 doing the conflict of interest and doing it on time.

8 Well, the way they came up to do that, because you  
9 have 3300 people to deal with, there is a prompt, it is on the  
10 computer and it says, I accept my obligations -- let me see if  
11 I can find it.

12 You will have it. It is pretty simple, a little form,  
13 and it says in the form that I am required to report outside  
14 activity and any financial interest to Florida Atlantic  
15 University, report of outside activity or professional  
16 activities as required in FAU's regulations and policies.

17 You click a box on your computer, and after you click  
18 the box you agree -- this is the honor system, by the way --  
19 you agree you follow the policies, and then you get your  
20 curriculum. That is what you teach.

21 In order to get your teaching assignment you have to  
22 click a box and say I will report. Here is the honor part of  
23 it. So you click the box and then it is up to you to report  
24 what is on the outside.

25 The university has to trust you. You can't go hire

1       investigators, things like that, to check on every professor.  
2       You have to rely on him to be honest and ethical.

3                   Professor Tracy refused to click the box, that little  
4       box, he wouldn't click it. What you will find out is, behind  
5       the scenes you will see emails and communications between  
6       Professor Tracy and the union where he says he didn't want to  
7       click the box. He was trying to avoid this obligation because  
8       he has other activities on the outside and doesn't trust the  
9       administration to deal with it properly.

10          Rather than disclose, which is his ethical duty, he  
11       conceals even though he is told time and time and time again to  
12       reveal these things. He is told that not just by FAU, not just  
13       by Vice Provost Alperin, not just by Dean Coltman, but by his  
14       direct boss, Mr. Williams, by the unit director of his union.  
15       His union is telling him to report, the president of his union.  
16       Also, a faculty member is telling him to report and finally his  
17       lawyer tells him he should have reported.

18                  You will see all those things.

19                  He said no. That is insubordination.

20                  Last but not least, he was one of two FAU faculty  
21       members that was insubordinate by refusing to timely or  
22       accurately submit the forms, those are the ultimate outside  
23       activities forms you will see and hear about, despite his  
24       supervisor's request. Two people didn't fill them out  
25       accurately, and they were both terminated. Professor Tracy

1       lost his job and a lady named Mrs. Cokelan. Two for two.

2               That is what you will hear. The people that were  
3       unethical and concealed things lost their jobs. Mrs. Cokelan  
4       had nothing to do with speech, she wasn't writing blogs, you  
5       name it. This is an entirely different situation, conflict of  
6       interest forms and refusing to report.

7               Okay, let's start with this.

8               You heard that Professor Tracy is going to claim he  
9       was confused about the conflict of interest policies.

10              This is what the collective bargaining agreement looks  
11       like, the cover, there is not a whole lot there. I want you to  
12       know what it looks like. You will probably see more than you  
13       care to during the trial, sorry about that, but it is important  
14       to the case.

15              Here is the rub, Professor Tracy, who claims he was  
16       unclear about what these provisions mean, he was the union  
17       president that signed the agreement, that is Professor Tracy.  
18       He signed the very agreement he is going to get up and tell you  
19       he wasn't sure about, had some unclarities. He is the guy that  
20       negotiated and signed off on the agreement.

21              This is one of the pages of the agreement and it talks  
22       about -- let's see here -- freedoms. I didn't want you to  
23       think I was making this up. 5.3, academic responsibility.  
24       Freedom entails responsibilities. The board of trustees of the  
25       university and UFF, that is the faculty union, accept

1 responsibilities, scholarship students of the university,  
2 larger community, and the responsibilities include being  
3 forthright and honest.

4 This is a form you fill out when you want to use the  
5 university's equipment. You have to ask permission before you  
6 do it. You will see that. That is a little click box, not a  
7 big deal, but he wouldn't do it.

8 Oh yeah, conflict of interest, that is Article 19,  
9 that is what he is going to tell you he had so much trouble  
10 understanding. This is the reportable outside activities,  
11 anything compensated or uncompensated that you do as part of  
12 your professional practice outside of the university, you have  
13 to let them know.

14 If you are doing things the university is paying you  
15 to do, your profession, you have to talk to the university  
16 about doing it because you are being paid to do it for the  
17 school.

18 Does that mean you can't do it? No. Conflicts of  
19 interest are prohibited and employees, that is Mr. Tracy, are  
20 responsible for resolving them by working with their  
21 supervisors.

22 How do you work with your supervisor? I think you  
23 have to tell them.

24 I missed the part about highest ethics. I told you  
25 that was in there, are bound to observe the highest standards

1 of ethics. Do the highest standards of ethics require you to  
2 reveal things and be transparent or should you be allowed to  
3 conceal those things and make your own calls?

4 You all will determine that.

5 Here is the back side of it. If you don't like --  
6 let's say you have a conflict and you don't like the way the  
7 university deals with it; you have an expedited grievance, so  
8 you can take it to the union immediately and they will give you  
9 a decision.

10 Let's say Professor Tracy asked the school if it is  
11 okay to do all the things he was doing and they said no; he  
12 could take it right to the grievance committee and they could  
13 decide that is okay.

14 Use of university resources. Right there, you want to  
15 use it, you have to ask permission. No university affiliation.  
16 Employee engaging in outside activity shouldn't act like a  
17 university representative. He signed the collective bargaining  
18 agreement, he agreed to every one of those things.

19 What is the timing of these things?

20 Here is how it works. In '05 he is appointed to the  
21 faculty, and during his tenure he teaches media studies, public  
22 opinion, new media and culture of conspiracy, teaches that at  
23 school.

24 Professor Tracy is elected president of the union. He  
25 is reelected president of the union in January '10, signs the

1       collective bargaining agreement. It contains the same  
2       provisions identical to what you will hear during the course of  
3       the case he was trying to tell the administration were unclear  
4       to him.

5                  He is appointed coordinator of multi-media studies,  
6       that is what he is paid to do for FAU. He starts his blog in  
7       2012. The Sandy Hook massacre occurs, that is on  
8       December 14th, in Newtown, Connecticut. Professor Tracy  
9       reports activities, photos, he reports a lot of money is made  
10      by politicians, legislators, lobbyists. He villainizes the  
11      families -- are you okay? Hang in there -- suggesting they are  
12      in it for the money. Newspapers, messages, phone calls,  
13      critical statements are made about James Tracy and FAU.

14                 Heads of the school meet, they have a conflict crisis  
15      resolution process. They meet with general counsel and conduct  
16      a crisis meeting. They want to know what the school has to do  
17      to protect Professor Tracy and his family, faculty and  
18      students, and want to know why is the school involved in this.  
19      How did we get involved in something personal?

20                 They meet with Mr. Tracy, and they talk first about  
21      safety. Are you okay? Is your family okay? Are people  
22      threatening you? Strangely, you are going to hear he seemed  
23      unconcerned. No problem.

24                 They didn't understand that, but that is the way he  
25      took it. Why was FAU involved?

1           Well, what they found out is that on one of the blogs  
2 he was referencing his job at FAU, so people were thinking FAU  
3 sponsored this and was behind it.

4           So, now these folks are writing threatening emails and  
5 messages and things like that to the university that the  
6 university has to deal with. That is not supposed to happen,  
7 but it is.

8           How are they going to handle this going forward? They  
9 come up with a plan, the first of many recommendations to  
10 Professor Tracy. Mark the date, January 2013, they recommend  
11 would you fill out your outside activities forms, please. He  
12 says no, doesn't do it.

13           There are questions raised about the things you are  
14 doing outside, they seem like what we are paying you to do.  
15 Time goes on, big university, a lot of people, then on  
16 March 28, '13, there is a letter you will see where he is  
17 disciplined. He is disciplined because even though he said he  
18 wouldn't use the university's name on the blog, what he is  
19 doing is loading up all of the other articles that attack the  
20 university. One is a letter personally attacking Dean  
21 Alperin -- Vice Provost Alperin and Dean Coltman. He didn't  
22 use a name, he loaded up articles attacking the university.

23           So, Professor Tracy agrees that is his right, that is  
24 what you can do if you are not comfortable with what the  
25 university does.

1           It is resolved, he commits, I am not going to do that  
2 any more and you will remove the grievance. We got it all  
3 worked out.

4           Then there is the audit I told you about. They issue  
5 an opinion and say we need to do a better job on outside  
6 activities. It has nothing to do with Professor Tracy, but  
7 sometimes you get caught by those things.

8           All faculty must agree to comply with the activities  
9 disclosures. The exhibits you are going to see are those  
10 disclosures, and they have the click box, the form you fill  
11 out, and the use of university resources.

12           Each of these people you will hear during the course  
13 of the trial told Professor Tracy report, you need to report,  
14 David Williams, his boss, Michael Motes (phon), his union  
15 director. You will see emails, you will see documents during  
16 this trial where they are telling him that. Don't take my word  
17 for it, and let me comment on it for a minute.

18           Hold me accountable for everything I am telling you.  
19 We will prove it during the course of the case, but do the same  
20 thing to them. Make sure when they tell you something that you  
21 see the evidence that supports it. No more media newspaper  
22 stuff, the proof is right here, it will be given to you. If it  
23 is not given to you, hold the person who is accountable to  
24 that. Keep us straight.

25           Robert sole ear, president of the union, that is the

1 position Professor Tracy has when he signs the agreement, he  
2 tells him he needs to sign. Heather Coltman, the dean, these  
3 are all people asking Professor Tracy to sign his forms and  
4 submit them. He doesn't.

5 Common knowledge you will hear, this is kind of union  
6 stuff I learned during the course of the case, if in doubt,  
7 fill it out. If you have some activity and you are not sure,  
8 fill out the form and comply. Comply and grieve.

9 If you fill out the form and you get punished for it  
10 and you don't think it is fair, then you can grieve them, but  
11 that way you are not being insubordinate. If your boss asks  
12 you to fill out the form, stay away from insubordination,  
13 comply with the boss' directions, and if you don't like what  
14 the boss does, the union is there to protect you.

15 He didn't do that. You will see that advice over and  
16 over and over again.

17 There is one that starts, rubber meets the road. His  
18 boss sends out an email to a bunch of people, not just him, a  
19 bunch of people, telling them you've got to click the box and  
20 report.

21 Tracy tells the union, you will see this, he admits  
22 clear as a bell that if money changes hands, he knows people  
23 have to report. Money changed hands, he didn't report. You  
24 will see that in his own words. He never reported it.

25 He tries not to click the box. Why would someone

1 avoid clicking the box that says I know I have an obligation?  
2 He didn't. You will see emails where people are saying I want  
3 to avoid that, that is the word he uses.

4 He is issued a notice of discipline. He writes to the  
5 union telling them he wants to avoid doing it. Tracy hasn't  
6 done it for three years, not one year, not two, three. Then he  
7 writes a letter saying he is confused.

8 The union president says he is confused about the  
9 policy he signed off on. He has been given two warnings in  
10 writing, this is the last one.

11 Dean Gottman (phon) writes to him and says this is  
12 your last chance, you need to submit the forms and comply by  
13 the 14th, and they have to be complete and accurate, or else.

14 On the 15th, Professor Tracy sends in the incomplete  
15 forms. He said he was on paternity leave, too busy on  
16 paternity leave to check his emails, remember that. He said he  
17 was on paternity leave, couldn't check emails, so he was a day  
18 late.

19 He submits a couple of forms, and in the forms, you  
20 will see them, they are incomplete, not accurate. They show  
21 that he previously misrepresented things. He never reports the  
22 book, this thing. Not on there.

23 He doesn't report the blog that is at the heart of  
24 most of what he is doing and never reports compensation.

25 Remember, I promised you an email where he says if you

1 get paid, you have to report.

2 So, he gets a letter after the -- the day after that  
3 that explains, look, we are proposing discipline, it's  
4 termination, enough is enough. He gets ten days to do that.  
5 The union gives you ten days and tells you what you are going  
6 to do and then you get a chance to explain yourself.

7 The union hires him a lawyer. You will see emails  
8 between him and his union lawyer. He gets an extension so he  
9 can respond. On the 4th of January, FAU tells him, we just  
10 found out about your book, and you have all this stuff about  
11 your work for FAU in your book and you didn't disclose that  
12 either, so they add that to the list and say, look, what is the  
13 story?

14 He still has time to respond. The book goes into  
15 great detail, as I said, about his relationship. We talked  
16 about the fact it was on Amazon.com until they took it down in  
17 December, not Professor Tracy, Amazon did. And he is getting  
18 money from the book and none of that is disclosed. No  
19 response.

20 He tells his lawyer that resolving the case could get  
21 in the way of a book he is writing. Let me say that again.  
22 Resolving this case would get in the way of a book that he is  
23 writing.

24 Formal notice of termination, he fires his lawyer and  
25 here we are.

1           So, folks, maybe we will be a chapter in the book, but  
2 this isn't play time for FAU. They have been accused of  
3 violating the First Amendment, and that is a serious charge for  
4 a public institution. This is their day, this is their trial,  
5 too, and we trust that you all will base your decision on the  
6 facts here, not conjecture. It would be easy -- I want to say  
7 two things.

8           One of the temptations of this case, and I ask you to  
9 resist, and I said -- I asked if you could wait until we get  
10 our chance. The temptation here is that the things that were  
11 published by Professor Tracy are -- I will put this mildly --  
12 very distasteful and some people might think that of course you  
13 fired this guy, look at the things he said, but they didn't.

14           Remember, the story starts in December of 2012, and  
15 Professor Tracy made it all the way to January 2016. They let  
16 him blog, they let him write his things, they let him have his  
17 First Amendment protections. What they wouldn't let him do is  
18 violate the rules, the rules that govern not just Professor  
19 Tracy, but everybody.

20           So, the last thing I want to say is thank you again  
21 for your time. I know that was long, and I appreciate you  
22 listening to me and taking notes.

23           At the end of the case, we will get up again and  
24 summarize the evidence, and then I will be able to show you the  
25 documents and point to what I promised.

1                   Thank you very much.

2                   *THE COURT:* Ladies and gentlemen, we will take our  
3 morning break because the first witness will be called and this  
4 would be a nice time to take a stretch break. It is 10:30. We  
5 will bring you back in at 10:45.

6                   Remember the same instructions apply. Even though you  
7 have been impaneled and you are the jury in the case, you are  
8 not to discuss the case among yourselves or anyone else. I  
9 will tell you when it is time to discuss the case among  
10 yourselves and that will be at the end when you deliberate,  
11 when all the evidence is put in, all the exhibits are in the  
12 jury room with you. Feel free to talk about other things.  
13 Take a good eye, look at who is at counsel table. Do not have  
14 any interaction with the parties outside the courtroom.

15                  We will see you back in 15 minutes.

16                  (*Thereupon, the jury leaves the courtroom.*)

17                  *THE COURT:* Okay, we will be in recess.

18                  (*Thereupon, a short recess was taken.*)

19                  *THE COURT:* Okay, there were three exhibits that I  
20 didn't finish ruling on last night as to the ones that were  
21 presented to the Court that would be at issue here today.

22                  So, at a hearing on November 29, 2017, the parties  
23 argued the admissibility of three of Plaintiff's Exhibits: 32,  
24 71, and 72. With respect to Exhibit 32, Plaintiff argued that  
25 the portions of this exhibit, an email, drafted by Plaintiff

1 should be admitted pursuant to Federal Rule of Evidence 803(3),  
2 which permits hearsay to be admitted to prove a declarant's  
3 state of mind.

4                 Here the Plaintiff seeks to admit a two-page email to  
5 show that he was confused about an FAU policy, however,  
6 Plaintiff's use of Rule 803, subsection 3, is overbroad. As  
7 the Eleventh Circuit has noted, "the state of mind exception  
8 does not permit the witness to relate any of the declarant's  
9 statements as to why he held the particular state of mind."  
10 *United States versus Samaniego*, 345 F.3d 1280, 1282, Eleventh  
11 Circuit, 2003.

12                 Here, Plaintiff's Exhibit 32 goes to great lengths to  
13 explain why he was confused, it goes far beyond showing that  
14 Plaintiff simply had a state of mind. Furthermore, Plaintiff  
15 is able to testify as to his own confusion. This evidence may  
16 be admitted through avenues other than Exhibit 32. Exhibit 32  
17 is excluded.

18                 With respect to Exhibits 71 and 72, these are emails  
19 between a non-party, Robert Zoeller, acting in his capacity as  
20 a union representative, in this case and Plaintiff. The emails  
21 are hearsay. As best the Court can discern, Plaintiff either  
22 wants to admit these emails because they were drafted in part  
23 by a former, not current, opposing party, Robert Zoeller in  
24 this case or to show one or both of the declarant's state of  
25 mind. The Court rejects both of these contentions.

1                   Exhibits 71 and 72 are excluded, with the exception  
2 that the Court reserves ruling on the component of Exhibit 72  
3 that is authored by David Williams, an employee of the  
4 Defendant.

5                   The Court made several rulings with respect to emails  
6 by David Williams, and I will be consistent with any portion of  
7 Exhibit 72 that relates to David Williams. The Court has ruled  
8 on every exhibit that was brought to the Court's attention that  
9 should come up today during Professor Tracy's testimony.

10                  Are our jurors ready?

11                  *THE COURTROOM DEPUTY:* Yes, ma'am.

12                  *THE COURT:* Let's bring our jurors in, please.

13                  (Thereupon, the jury returned to the courtroom.)

14                  *THE COURT:* Welcome back, everyone, you may be seated.

15                  *MR. LEO:* Plaintiff calls Dr. James Tracy.

16                  JAMES TRACY, PLAINTIFF, SWORN

17                  *THE WITNESS:* James Frederick Tracy.

18                  *THE COURT:* I do want to remind our jurors, again, so  
19 each party has a right to call witnesses during his case. The  
20 witness you are about to hear from has been called by both  
21 parties. In the interest of time, the parties agreed to call  
22 Dr. Tracy once. If he is called a second time, it would be for  
23 a limited purpose.

24                  You may hear an attorney say he or she is about to  
25 call direct or cross-examination, that is to aid the Court and

1 counsel. You should pay attention to what the witness has to  
2 say as you would for any other witness.

3 You may proceed.

## **DIRECT EXAMINATION**

5 | BY MR. LEO:

6 Q. Dr. Tracy, could you tell the jury about your background;  
7 where do you live?

8 A. Boca Raton, Florida.

9 Q. How long have you lived in Boca Raton?

10 A. Since 2003. Initially, I moved down here in 2002, lived in  
11 Boynton Beach, and that is when I was hired by Florida Atlantic  
12 University. Myself and my spouse, we moved to Boca Raton in  
13 2003, we purchased a piece of property a few minutes from the  
14 university.

15 Q. Who is your spouse?

16 A. Maris Leone Hiashi (phon).

17 Q. Where is she employed?

18 A. Florida Atlantic University, librarian.

19 || Q. How long has she been there?

20 A. She has been there since 2002, hired one month after  
21 myself.

Q. Do you have any children?

23 A. Four children, Liam is 2 and Anidam (phon) is 6, Maureen is  
24 9, and Shavon (phon) will turn 12 on December 10th.

25 Q. Could you tell the jury what degrees you have?

1       A. I have a Bachelor's Degree in radio, television and film  
2 from San Jose State University, a Master's in media arts from  
3 the University of Arizona, which I was awarded in 1998, and  
4 then in 2002, a Doctorate from the University of Iowa in mass  
5 communications.

6       Q. Can you explain to the jury what a doctorate is?

7       A. That is the highest degree that is granted in a given field  
8 of study. So, that involves having written, for example, a  
9 thesis in a particular area that incorporates the relevant  
10 research and demonstrates your expertise in that area.

11      Q. And what areas are your expertise, Dr. Tracy?

12      A. Journalism, journalism history, political economy of the  
13 mass media, mass communication theory, all of these were  
14 encompassed in the dissertation as well as the Master's.

15      Q. Could you tell the jury how you came to work at Florida  
16 Atlantic University? When did you start?

17      A. I was on the job market in 2002, and it is fairly  
18 competitive, I think I applied to 25 or 30 schools, something  
19 like that, and I was given an on-campus interview at Florida  
20 Atlantic. There were other prospects as well, but I was given  
21 an on-campus interview and within the course of a couple of  
22 weeks they hired me.

23           I presented my research on my dissertation at the meeting  
24 with the faculty there in the spring of 2002.

25      Q. Can you explain to the jury what you were hired to do at

1 Florida Atlantic University?

2 A. The position was in multi-media journalism, primarily  
3 teaching classes on journalism history, communication theory,  
4 communication in social theory, political economy of  
5 communication and production classes, as well such as broadcast  
6 journalism and the like.

7 Q. And were you hired to do anything other than teach?

8 A. Yes, as a tenured track faculty member, that is what I  
9 was -- tenured track means that you join the faculty with the  
10 anticipation of becoming tenured, meaning you have a lifetime  
11 guarantee of employment provided in the first five years of  
12 employment you produce ample research, your teaching is ideally  
13 above satisfactory or excellent and you perform service to the  
14 university, you serve on committees and a number of things in  
15 that regard.

16 The assignment of the faculty member is done by, research  
17 teaching and service. Research involves published material,  
18 material that appears in peer review journals or chapters and  
19 books or scholarly or academic styles of communication.

20 Q. Could we followup on that one minute.

21 You said scholarly and academic; could you tell the jury  
22 what you mean by that?

23 A. Yes. There is a significant difference between scholarly  
24 and research that is pedestrian, one that we might read in a  
25 magazine or web. Scholarly is the process of peer review so

1       your work is being judged by others in the field that have  
2       expertise in your area.

3           So my work, for example, is submitted to journalists in the  
4       field, media studies or journalism history, mass communication,  
5       and the paper is usually submitted to a journal after several  
6       months of work. So, what initially takes place is a research  
7       project might become -- it comes out of a working paper from a  
8       seminar or the equivalent, and then it is submitted to various  
9       conferences, and it makes the rounds. You go to conferences,  
10      and the conferences could be in the United States, they could  
11      be abroad. The major professional organizations have  
12      conferences on an annual basis so scholars can do this.

13           They present research, and ideally you have people there  
14      attending the presentation, you are frequently on a panel and  
15      they provide feedback. Referees for the conference provide  
16      feedback, so they might ask have you looked at this, have you  
17      considered this, do you know about this work, why haven't you  
18      considered this particular area, this might be lacking in  
19      methodology, theoretical framework, and so you might want to  
20      incorporate this.

21           You want this feedback because you want the paper to be as  
22      solid as possible before it is submitted to a journal for  
23      publication. That is a different level from the conference  
24      paper where it is expected that the paper will have some flaws,  
25      maybe quite a few flaws, but you are typing the paper up to the

1 point where something is so tight, so good where it would  
2 eventually reach publication, you see the light of day in that  
3 regard. By that time it is something that is flawless.

4 People who -- the faculty members on the tenured track or  
5 who are tenured are expected to do one of those each year, to  
6 have something in a peer reviewed journal or a chapter in a  
7 book or a book live treatment, and a book life treatment will  
8 take five or six years to do, in some cases ten or 12 years,  
9 who are meticulous, who go all over the world to do research in  
10 archives. It could take that long for a scholarly publication  
11 to culminate. A good scholarly publication takes 18 months to  
12 two years to produce.

13 Q. Is this your opinion or is this a standard? Is there a  
14 standard for peer review or what is academic or scholarly?

15 A. Certainly there is a standard, and I hope I described it.  
16 I think that is the case. I can speak to areas in social  
17 science and humanities, history and so forth, but all of  
18 these -- and communication, media studies, what have you -- but  
19 all these disciplines have the general framework for the review  
20 of scholarly material in terms of, again, peer review or review  
21 by colleagues, because that is the only -- they are the experts  
22 in the field, and I would imagine the process would be very  
23 similar in a law journal.

24 Q. Let's talk about your blogging. When did you start  
25 blogging?

1 A. In March 2012.

2 Q. And can you describe for the jury what blogging is?

3 A. Well, the term blog is short for web blog, or it is more or  
4 less someone having a website and putting their opinions, their  
5 reflections, their perspective online for the public to see and  
6 read.

7 Q. And does blogging require a certain platform?

8 A. Well, it is suggested by its name web blog, on the  
9 worldwide web, on the internet, but there are other forms of  
10 blogging, Facebook or Twitter. Some of the other more recent  
11 social media sites certainly could be conceived of as a form of  
12 blogging. On Facebook people blog about their family, they  
13 blog where they went for coffee around the corner. They could  
14 be blogging about a number of things.

15 Another term is micro blogging. Journalists and other  
16 professionals and authors use Twitter as micro blogging. They  
17 might put out a link about what is going on about a news story,  
18 but it is limited to 140 characters. It is a form of online  
19 speech. Blogging itself encompasses all of those things.

20 Q. And what did you blog about, Dr. Tracy?

21 A. Well, I was interested in blogging about politics, current  
22 events, the importance of political events, and to some degree  
23 how they are historically situated and the like, but things  
24 along those lines. Current events that might be deemed  
25 controversial.

1 Q. Did you have rules for your blogging?

2 A. No. If what you mean in the way of comparing it to  
3 scholarly research, no. I am my own editor, I can do what I  
4 want. In that regard, it is kind of a recess from doing  
5 anything scholarly, it is an entirely different level.

6 Q. Were there any editors for your blog other than you?

7 A. No.

8 Q. Any professional standards that you followed with your  
9 blogging?

10 A. No, not really.

11 Q. Any research requirements or standards for blogging?

12 A. Well, there can be if one wants, but generally, they are  
13 not requirements. There is no professional organization or set  
14 of organizations, no discipline or set of disciplines  
15 represented in universities or anything like that for standards  
16 for blogging, no such thing.

17 Q. Did Florida Atlantic University have standards for blogging  
18 at any time?

19 A. Not that I am aware of, no.

20 Q. Was there a policy on blogging or use of social media?

21 A. No.

22 Q. Were there any rules regarding the use of which file or  
23 what work computers to use the internet and share your  
24 viewpoints or opinions online?

25 A. No.

1 Q. With respect to blogging again, are you required to use  
2 references or special citations like you might in an academic  
3 or peer reviewed publication as you described?

4 A. Well, you can if you want, and hyper linking lends itself  
5 to that. But as far as there being a formal style, if you are  
6 submitting something to a good journal, one highly respected in  
7 the field, or even a conference paper, you have to follow  
8 proper citation, the American Psychological Association, it  
9 could be the Modern Language Association, these are all  
10 particular styles. So you have to conform to that style in  
11 order for your work to be accepted seriously.

12 I edited a journal one time, so I know. People would --  
13 scholars would send me their work and one of the first things I  
14 look at is form. You look at the index, bibliography, you look  
15 at the introduction of the first three or four pages, and you  
16 know where they are going in the publication.

17 Q. Where is it that you edited the journal?

18 A. I edited a journal at Florida Atlantic University for an  
19 association I belonged to.

20 Q. Did anyone submit a form for blogging?

21 A. No, it wouldn't been accepted. This has to do with one's  
22 scholarly reputation. No one would submit a blog to that.

23 Q. Are you saying you do not consider your blogging scholarly  
24 or academic?

25 A. No, I do not.

1 Q. You were describing pedestrian, can you elaborate on that?  
2 You mean free form or -- could you explain more about what  
3 you mean by pedestrian?

4 A. Pedestrian research versus academic research, I attempted  
5 to make the distinction by highlighting what academic research  
6 is, and the rigors involved in that.

7 One does not obtain tenure without kind of jumping through  
8 those hoops and following those types of protocols.

9 Anyone could set up a blog on a Twitter account, Facebook,  
10 Word Press, there is blogger, you could do it in a minute and a  
11 half or two minutes, and then you are online and sharing your  
12 thoughts and perspectives.

13 Q. When you were blogging, did you use the university's web  
14 server to host your blog?

15 A. No.

16 Q. Did you use the university's email system or email account  
17 to communicate through the blog?

18 A. No.

19 Q. I understand you may have posted using your work computer;  
20 is that true?

21 A. No.

22 Q. When it comes to podcasting, there has been some discussion  
23 about podcasting, can you tell the jury what podcasting is?

24 A. Yes, podcasting is essentially, it borrows from the term  
25 broadcasting, but it is putting a computer file up online, and

1       they can listen to it or download it. There easy tunes sharing  
2       a platform for podcasting as well.

3       Q. When you say a computer file, what is that?

4       A. MP3 or M34.

5       Q. Would you explain to the jury what that is?

6       A. More or less a data file, sides, depending on what length  
7       the audio recording is, and you put it up on your blog if you  
8       want, which is what I would do sometimes.

9       Q. So your blogging included podcasting?

10      A. Yes, I had a podcast that I put out.

11      Q. Did you receive compensation for blogging or podcasting?

12      A. No.

13      Q. At any time?

14      A. (Witness shakes head no.)

15      Q. And as for Twitter, Facebook, you mentioned social media  
16       sites, did you use these as well as the blog?

17      A. Yes, they were to a certain degree extensions of the blog  
18       that I had.

19      Q. And you testified that you wrote about current events as  
20       well as some other issues. How about matters of public  
21       concern, did you write about matters of public concern?

22      A. Yes.

23      Q. Can you describe to the jury some of the matters of public  
24       concern you did write about?

25      A. Well, I think probably one of the most well-known is the

1 Sandy Hook school massacre which occurred December 14, 2012.

2 People have heard about it in the opening statements.

3 Q. Can you tell the jury why you blogged about the Sandy Hook  
4 event?

5 A. Well, when it initially took place, I think it was on a  
6 Friday, I didn't pay much attention to it when it was taking  
7 place. At that time, this is 2012, our oldest child, Shavon,  
8 was seven years old, she just turned seven on December 10th.

9 I remember talking with my wife Maris in the kitchen in the  
10 evening, and she said this terrible event --

11 MR. CURLEY: Your Honor, hearsay.

12 THE COURT: Sustained.

13 BY MR. LEO:

14 Q. Without telling us what your wife said, could you describe  
15 what you said about Sandy Hook?

16 A. Once again, I had young children and this affected members  
17 of my family quite traumatically I could tell. I didn't know  
18 much about the event. I said to myself, those things are  
19 tragic, but they happen. We try to normalize these things, and  
20 I began to look at the coverage more closely.

21 Q. You say coverage, are you referring to the media?

22 A. Mainstream media, mainstream media. I looked at it more  
23 closely. There were a number of anomalies and problems as far  
24 as missing information and things, and it caused for me to look  
25 at the event more closely. The more closely I looked at it,

1       the more questions I had. There were various problems and  
2       concerns, normal emergency protocols, medical protocols were  
3       abandoned. Why would that take place? Especially, why would  
4       it take place and why wouldn't parents sue the state of  
5       Connecticut or the school district or what have you for not  
6       actually partaking of that?

7           So, these were the types of problems that I saw with the  
8       event that intrigued me and caused me to write more about it,  
9       to delve into it.

10          At the same time, there were alternative media outlets and  
11       people doing blogs and things like that, You Tube,  
12       alternatively, that had a different set of perspectives and  
13       take on the Sandy Hook event, and I found some of these quite  
14       compelling, and disturbing as well because there are certain  
15       implications.

16          And I took some of these things that I saw in the  
17       alternative media and I elaborated on them in my blog.

18   Q. When you say you elaborated on them in your blog, did you  
19       bring Sandy Hook or your viewpoints or opinions about Sandy  
20       Hook into the classroom?

21   A. No.

22   Q. Why not?

23   A. Well, it was my own personal opinion, it was something I  
24       was doing on my own time.

25   Q. When did you start blogging about Sandy Hook?

1       A. It was in late December of 2012.

2            MR. LEO: Your Honor, may I approach the witness?

3            THE COURT: Just show counsel whatever it is you are  
4 going to be showing the witness.

5            MR. LEO: Exhibit 47, marked as Plaintiff's 47. If  
6 you would take a look at what is in there.

7            THE COURT: Do I have an updated exhibit list from the  
8 Plaintiff?

9            MR. LEO: Yes, your Honor.

10          THE COURT: I do?

11          MR. MEDGEBOW: Yes, we gave it to the Court yesterday.

12          MR. CURLEY: No objection.

13          THE COURT: Labeled Defendant's objections to the --  
14 are you calling this your exhibit list?

15          MR. LEO: Yes.

16          THE COURT: Okay. What exhibit are we talking about  
17 now?

18          MR. LEO: 47, your Honor.

19          THE COURT: Okay, 47. Okay. So you are seeking to  
20 admit it, and there is no objection. Is that what I am  
21 hearing?

22          MR. CURLEY: If that is directed to me, yes, your  
23 Honor.

24          THE COURT: Okay, admitted without objection.

25          MR. LEO: Yes, your Honor.

1                   *THE COURT:* Admitted without objection.

2                   *MR. LEO:* May we publish?

3                   *THE COURT:* You may.

4                   (Whereupon Plaintiff Exhibit 47 was marked for evidence.)

5                   *THE COURT:* Ladies and gentlemen, when exhibits are in  
6 evidence, you will have an opportunity to see the exhibits,  
7 sometimes they publish them, sometimes they don't. They will  
8 go back with you when you deliberate and you will have all the  
9 time to review it and study it.

10                  *BY MR. LEO:*

11                  *Q.* Dr. Tracy, have you had a chance to review Exhibit 47?

12                  *A.* Yes.

13                  *Q.* Could you tell the jury what this is?

14                  *A.* This was a blog post that I posted on December 24th of  
15 2012, on my blog.

16                  *Q.* And this is quite extensive.

17                  *A.* There is another post as well that is included, Sandy Hook  
18 school massacre timeline, which is a compilation of primarily  
19 mainstream news stories that appeared between -- I guess 1995,  
20 and going through 2013 or so, stories related to the event.

21 This was not -- this was simply a set --

22                  *MR. CURLEY:* Your Honor, I object. There is no  
23 question pending, this is nonresponsive.

24                  *MR. LEO:* The question is, what is this?

25                  *THE COURT:* Overruled. You may explain.

1                   *THE WITNESS:* The Sandy Hook massacre timeline is an  
2 event of -- excuse me a list, list, extensive list, synopsis  
3 that are hyper linked to articles, again, most of them are from  
4 mainstream news outlets.

5                   This is something that was done previously by the  
6 researcher Paula Thompson, something called the 9/11 timeline.

7                  *BY MR. LEO:*

8                  *Q.* Doctor, do you have a monitor in front of you?

9                  *A.* Yes.

10                 *Q.* When you are talking about the timeline, that is the second  
11 post that is in here; is that correct?

12                 *A.* Yes.

13                 *THE COURT:* Is that still part of 47?

14                 *MR. LEO:* Yes, your Honor, there are two posts in this  
15 composite.

16                 *THE COURT:* Okay.

17                  *BY MR. LEO:*

18                 *Q.* I notice on the exhibit the first one is dated December 24,  
19 2012?

20                 *A.* Yes.

21                 *Q.* The second post is January 6, 2013?

22                 *A.* Yes.

23                 *Q.* Is this a fair and accurate representation of when you  
24 posted these on your blog?

25                 *A.* In a sense it is. The post of January 6, 2013 was a long

1 and ongoing process that would be added to cumulatively on a  
2 fairly regular basis.

3 If there was a news article about the Sandy Hook event I  
4 created this analysis and added it on there.

5 Q. So, this blog is something you could edit and change along  
6 the way?

7 A. Yes.

8 Q. With respect to these two posts, were you compensated for  
9 writing these two posts, the Sandy Hook massacre time line and  
10 unanswered questions and missing information?

11 A. No.

12 Q. Did anybody ask you to write these?

13 A. No.

14 Q. Did you write these for a book?

15 A. No.

16 Q. And did anybody compensate you for these posts?

17 A. No.

18 Q. Would you consider these posts in Exhibit 47 scholarly or  
19 academic work?

20 A. They are not scholarly and not academic.

21 Q. Why is that?

22 A. To go back to the criteria I explained a short while ago,  
23 they would not fit or been rigorous -- rigorous enough to be  
24 published in a scholarly journal that takes itself seriously.

25 Q. You never submitted these posts, these blog posts to any

1 scholarly venue or forum?

2 A. No.

3 Q. Were these ever published in a scholarly work?

4 A. Not a scholarly work, no.

5 Q. Let's go back for a moment. You can take this off.

6 Let's go back for a moment to FAU.

7 Did you write these posts for your work at FAU?

8 A. Exhibit 47?

9 Q. Yes.

10 A. No, I did not.

11 Q. Would you consider these posts a part of your job duties or  
12 obligations at the university?

13 A. No.

14 Q. And did FAU ever ask you to blog?

15 A. No.

16 Q. Was that part of why you were hired, did they say we need  
17 to have a blogger here?

18 A. No.

19 Q. There has been some talk about this activity being an  
20 outside activity.

21 What is your understanding of outside activity at FAU; what  
22 does that mean?

23 A. That language comes from the UFF FAU board of trustees  
24 collective bargaining agreements, Article 19, and it is  
25 something that is likewise ensconced in Florida Statute 112,

1 and so, outside activities typically means if someone has a  
2 business or someone is employed outside of the university, then  
3 that activity needs to be reported.

4 So, if I am teaching communication classes in the day time  
5 at FAU, and I am moonlighting at Lynn University or Nova  
6 Southeastern or some other institution that needs someone to  
7 teach communication classes that involves compensation, that is  
8 something that has to be reported because there could  
9 potentially be a conflict of interest since one is a state  
10 employee in a like institution.

11 If someone has their own business there could be a  
12 potential conflict of interest between that business, that  
13 entity, and the State of Florida.

14 MR. LEO: May I approach?

15 THE COURT: Did you show defense counsel?

16 MR. LEO: Yes.

17 THE COURT: Fine.

18 BY MR. LEO:

19 Q. I will show you Plaintiff's Exhibit 87.

20 Doctor, do you recognize this document?

21 A. I do.

22 Q. What is it?

23 A. Florida Atlantic University Board of Trustees and United  
24 Faculty of Florida collective bargaining agreement for  
25 2012-2015.

1 Q. And this agreement contained the outside activities policy  
2 you referenced a moment ago?

3 A. Well, there is Article 19 that refers to outside  
4 activities, outside employment and so forth, but not the policy  
5 specifically.

6 MR. LEO: Your Honor, I am going to show the witness  
7 Plaintiff's Exhibit 12. This is part of this agreement,  
8 Article 19.

9 THE COURT: Are you seeking to do anything with 87,  
10 are you seeking to have it admitted?

11 MR. LEO: Yes.

12 THE COURT: Any objection?

13 MR. CURLEY: No objection, nor is there an objection  
14 to Article 19 that he just handed to him, providing counsel  
15 represents that it is an accurate representation of the  
16 provision in the agreement.

17 THE COURT: 87 is admitted without objection. And  
18 what was the other exhibit?

19 MR. LEO: 12.

20 THE COURT: So 12 is -- can you represent that is an  
21 accurate rendition of Article 19?

22 MR. LEO: Yes, a copy from 2009 -- sorry, 2012-2015  
23 collective bargaining agreement.

24 THE COURT: Exhibit 12 is also admitted without  
25 objection.

1 (Whereupon Plaintiff Exhibits 87, 12 were marked for  
2 evidence.)

3 MR. LEO: At this time, could we publish Exhibit 12?

5 | BY MR. LEO:

6 Q. Can you see the monitor?

7 | A. Yes.

8 Q. Can you explain how this works with Chapter 112, did you  
9 say?

A. Florida Statute 112, yes.

11 Q. What is your understanding of how this policy works with  
12 Chapter 112?

13 A. Chapter 12 is cited here, the first paragraph of the  
14 article, in all official acts an employee is bound to observe  
15 the highest standards of ethics consistent with the code of  
16 ethics of the State of Florida (Chapter 112, part III, Florida  
17 Statutes and related advisory opinions) and Board and  
18 university regulations.

19 Q. This language in Article 19, did you bargain for this  
20 yourself, this language?

21 A. This is something that was -- are you talking about me?

22 || Q. You personally.

23 A. Personally, no.

24 Q. Who came up with Article 19, this language in the  
25 collective bargaining agreement, if you know?

1 A. This is something that was legacy language.

2 Q. What do you mean by that?

3 A. This was something that -- when the state university system  
4 evolved in 2002 under Governor Jeb Bush the bargaining went  
5 from the state level to each university, and so each university  
6 began to bargain their own collective bargaining agreement  
7 between the board of trustees and the faculty body at the given  
8 university. I believe that is where this language originated  
9 from.

10 Q. Is this the only outside activity policy at the university,  
11 what is on this article here?

12 A. Policy? The policy is continually elaborated by the  
13 university.

14 Q. What do you mean by that?

15 A. The policy itself is continually elaborated by the  
16 university.

17 Q. Could you elaborate on what you mean by elaborate?

18 A. A process that was ongoing, that was the case during my  
19 termination, and that is one of the reasons I had a number of  
20 questions about it, it was being revised at the time I was  
21 being terminated.

22 Q. In this Article 19, there is a definition under 19.2(a).  
23 Do you see that?

24 A. Yes.

25 Q. Can you read for the jury what the definition of reportable

1 outside activity is in this article?

2 A. Any activity which interferes with the full performance of  
3 the employee's professional or institutional responsibilities  
4 or obligations.

5 Q. 2(a)?

6 A. 2(a), outside activity?

7 Q. Yes, that one.

8 A. Reportable outside activity shall mean any compensated or  
9 uncompensated professional practice, consulting, teaching or  
10 research which is not part of the employee's assigned duties  
11 and for which the university is provided no compensation.

12 Q. So it is not any outside activity has to be reported, it is  
13 what is on here, what is set forth in the definition that has  
14 to be reported. Can you explain your understanding of what  
15 outside activity has to be reported?

16 MR. CURLEY: I object to the form of the question.

17 THE COURT: You are objecting to the question as to  
18 the witness explaining his understanding of Article 19?

19 MR. CURLEY: I object to the first part of the  
20 question. I have no problem with him explaining.

21 THE COURT: Is the question you want him to explain  
22 the activity reported?

23 MR. LEO: I can explain.

24 BY MR. LEO:

25 Q. I understand reported activity, compensated activity,

1 teaching or research which is not part of the employee's  
2 assigned duties. Is there any outside activity that needs to  
3 be reported under this policy?

4 A. Um-m-m --

5 Q. Is there more to it than what is on the paper?

6 A. There are reportable outside activities and non-reportable  
7 outside activities.

8 Q. What is a non-reportable outside activity?

9 A. Well, if someone were doing something, you know, in their  
10 extra curricular life, say they are an economics professor or  
11 something, one would not have to file a reportable outside  
12 activity form to make a grocery list and prove what the  
13 family's budget is for the given week, that would be  
14 ridiculous.

15 Q. When it says professional practice, is that defined in this  
16 article?

17 A. No.

18 Q. Is it defined anywhere by the university?

19 A. No.

20 Q. What is the understanding of professional practice that you  
21 had when you were employed at FAU?

22 A. That it involved my research, teaching and service.

23 Q. Your academic --

24 A. Academic work.

25 Q. Academic scholarly --

1       A. Material that I would be submitting to academic  
2 conferences, scholarly publications, anything along those  
3 lines, teaching, creation of syllabi, meeting with classes,  
4 assessing student work and issuing grades, doing service such  
5 as sitting on a committee, college committee, university  
6 committee, department committee, editing the journal that I was  
7 editing. Up until around, I believe 2012 or 2013, editing a  
8 journal was considered service, and suddenly it became research  
9 for one reason or another. Anyway, that is something else --  
10 that would be professional activity.

11      Q. You used the word professional activity.

12           Is professional activity defined in here, Article 19?

13      A. No.

14      Q. How about professional research?

15      A. No.

16      Q. Professional teaching?

17      A. No.

18      Q. Professional consulting?

19      A. No.

20      Q. How about the word "professional", is the word  
21 "professional" defined in Article 19?

22      A. No.

23      Q. Is the word "professional" defined in any of the  
24 university's guidelines, forms, or any documents relating to  
25 the outside activities policy at the university?

1 A. Not that I am aware of, no.

2 Q. Going back to your blogging, did you teach anything about

3 your blogging at FAU?

4 A. No.

5 Q. Did you bring your blog into the classroom?

6 A. No.

7 Q. Did you bring a podcast into the classroom?

8 A. No.

9 Q. Why not?

10 A. It is not professional activity, not something referred in

11 a journal, it is not scholarship, it is not something to bring

12 into the classroom to be presented.

13 Q. Going back to the controversy the jury heard about in

14 opening, can you describe what happened after the university

15 found out about your blogging, and tell us a little bit about

16 what happened?

17 A. Yes. There was -- in early January of 2013, the Sun

18 Sentinel contacted me and wanted to do -- wanted to speak to me

19 on the phone about what I had discussed concerning Sandy Hook

20 on my blog, and so I spoke with them for a bit and an article

21 came out that I thought was quite inflammatory and this became

22 a national news story, as you know, an international news story

23 in fact that a university professor has weighed in on the Sandy

24 Hook massacre event, and asked questions about the official

25 narrative, which is what it essentially boiled down to.

1           And this created an uproar in the media. It was admittedly  
2 a good story for a reporter because it was quite sensational,  
3 but I think that quite a few things were misrepresented as  
4 well.

5 Q. What was misrepresented by the media?

6 A. Well, the fact that they used the term conspiracy  
7 theories --

8           MR. CURLEY: Hearsay, your Honor.

9           THE COURT: The witness can't testify what was  
10 published in the media. You have to redirect your question.

11 BY MR. LEO:

12 Q. Without saying what the media said, can you tell us what  
13 was misrepresented?

14 A. I think what was primarily misrepresented was James Tracy  
15 and who he is, and that is the problem to this day.

16 Q. Going to the effect on FAU of this media, are you aware of  
17 the effect that the media had on the university in 2013?

18 A. I was -- only by being called into a meeting on  
19 January 18th of 2013.

20 Q. And who was at that meeting?

21 A. Provost Diane Alperin, Associate Provost for Bushnell  
22 Services, and Dean Heather Coltman and my grievance chair for  
23 the union, Douglas Broadfield, who is a professor of  
24 anthropology.

25 Q. When was this meeting?

1 A. January 18, 2013.

2 Q. Where was it held?

3 A. It was held in the arts and letters building, the dean's  
4 conference room in the arts and letters building, in the  
5 Dorothy Schmidt College of Arts and Letters on the Boca Raton  
6 campus.

7 Q. Could you tell the jury what transpired in this meeting?

8 A. Well, they discussed first and foremost --

9 Q. When you say "they", who?

10 A. I am talking about Dean Coltman, Dean of the College of  
11 Arts and Letters, one level above me in supervisory status, and  
12 Associate Provost Alperin.

13 Q. Going back to the administrators you just named, do you  
14 know Heather Coltman?

15 A. Yes.

16 Q. Could you tell us who do you know Heather Coltman was at  
17 the time?

18 A. She was one level above me, my immediate supervisor was  
19 Naomi Marin in the school of studies where my tenured position  
20 was, that is the college of -- Dorothy Schmidt College of Arts  
21 and Letters. The college of arts and letters is a component of  
22 the broader university that encompass eight colleges.

23 Q. Are you familiar with what Dean Coltman's duties were at  
24 the college and university in 2013?

25 A. Yes.

1       Q. What were those duties and responsibilities?

2       A. To oversee as chief administrator the college of arts and  
3 letters, that was her foremost responsibility.

4                  She is not a scholar or social scientist or historian or  
5 anything of the like, she is a musician, she is from the  
6 department of music.

7       Q. Was she an agent and employee of the Defendant university  
8 during this meeting?

9                  MR. CURLEY: Objection, calls for a conclusion.

10                 THE COURT: Sustained.

11                 BY MR. LEO:

12       Q. Was she a dean, Heather Coltman, of the university in this  
13 meeting on January 18, 2013?

14       A. She was the interim dean at the time, yes.

15       Q. How do you know that?

16       A. I think it is common knowledge, but I received  
17 correspondence from her and she is someone who signs my annual  
18 assignment, perfunctory source of administrative things.

19       Q. Who is Diane Alperin?

20       A. Diane Alperin is the associate provost for personnel at the  
21 university, so she functions out of what we refer to as the  
22 third floor of the administration building on the Boca campus.  
23 And she oversees the entire university and personnel relations,  
24 and I believe she served as the provost at one time or interim  
25 provost at one point or another when there was a new president

1 being installed and an interim president. She has been with  
2 the university for many years.

3 Q. In what capacity was she at the time of the meeting on  
4 January 18, 2013, if you know?

5 A. She was serving in her capacity as the associate provost  
6 for personnel.

7 Q. Was it part of Dean Coltman and Vice Provost Alperin's  
8 duties at the university to be involved in disciplinary action  
9 at the time?

10 A. Yes.

11 MR. LEO: Your Honor, there is no objection to this  
12 exhibit, Plaintiff's Exhibit 1.

13 THE COURT: Okay, Exhibit 1 admitted without  
14 objection.

15 (Whereupon Plaintiff Exhibit 1 was marked for evidence.)

16 MR. LEO: For the record, showing you Plaintiff's  
17 Exhibit 1. May we publish, your Honor?

18 THE COURT: Yes.

19 BY MR. LEO:

20 Q. Do you recognize Plaintiff's Exhibit 1?

21 A. Yes.

22 Q. And what is it?

23 A. This is a memorandum, a letter from interim Dean Coltman to  
24 myself, James Tracy, dated January 28, 2013.

25 Q. And what is the letter about?

1       A. It is a summary of the meeting that we had ten days prior,  
2 which was January 18th of 2013.

3       Q. Is there anything inaccurate about Dean Coltman's summary  
4 of the meeting reflected in this document?

5       A. Yes.

6       Q. Can you tell us what the first thing is that is inaccurate  
7 about the letter, if you wouldn't mind reading?

8       A. Paragraph three: "I asked you about the disclaimer posted  
9 on memoryholeblog.com. Specifically, I asked you when the  
10 disclaimers were posted. You stated that the initial  
11 disclaimer was posted at the same time that the blog began,  
12 which you believed was sometime in either March or April of  
13 2012. You added that you had recently changed the disclaimer  
14 so it made no mention of your employment at FAU. I asked you  
15 whether or not you had updated your disclaimer in  
16 December 2012, and you replied that you had not. Later in the  
17 day of January 18, I asked you to provide evidence of the  
18 disclaimers you have posted and the dates that they appeared on  
19 the blog. You agreed to supply documents reflecting the  
20 disclaimers."

21           And then in the fourth paragraph it goes on to another  
22 topic about Global Research.

23       Q. What was wrong with that?

24       A. What was wrong with it, I was taken aback that the events  
25 of our meeting were misrepresented because that afternoon of

1       January 18th, Dean Coltman contacted me at my residence on my  
2 land line and asked for further evidence of the disclaimer.

3           I provided the additional evidence by email within 90  
4 minutes of that telephone call, so she had that in hand when  
5 she wrote the letter suggesting I have not provided any  
6 disclaimer and was somehow being rebellious.

7 Q. Speaking of disclaimer, did you have a disclaimer on your  
8 blog?

9 A. I was careful to have a disclaimer on the blog from its  
10 inception, March of 2012.

11 Q. At the time of this memorandum, January 28, 2013, did you  
12 have a disclaimer on your blog?

13 A. Yes.

14 Q. Before this memorandum, did you have a disclaimer on your  
15 blog?

16 A. Yes.

17           MR. LEO: Your Honor, I would like to show the witness  
18 an exhibit, 6-A.

19           THE COURT: Have you shown Defense?

20           MR. LEO: Yes, your Honor.

21           THE COURT: Any objection? And was it covered by a  
22 ruling already?

23           MR. CURLEY: Hearsay, your Honor.

24           THE COURT: Has the Court addressed this already?

25           MR. CURLEY: No.

1           *THE COURT:* Did you not bring it to the Court's  
2 attention yesterday? I thought I reviewed all of the exhibits  
3 that were to be introduced today.

4           *MR. LEO:* We would not like to introduce it at this  
5 time. I would like to show the witness the document.

6           *THE COURT:* You are not going to seek to introduce it?  
7 He will not testify about it? If it is not in evidence, he  
8 shouldn't testify about it.

9           *MR. LEO:* One moment, your Honor.

10          *THE COURT:* Yes.

11          *BY MR. LEO:*

12          *Q.* Dr. Tracy, word for word, what was your disclaimer on your  
13 blog of January 18, 2012?

14          *A.* That's -- that the views and opinions expressed on the  
15 memoryholeblog are those of James Tracy and are not in any way  
16 representative of or condoned by Florida Atlantic University or  
17 the state university system of Florida.

18          *Q.* And did you explain to Dean Coltman that you had this  
19 disclaimer on your blog?

20          *A.* Yes, I am quite certain I did at this meeting.

21          *Q.* When you told Dean Coltman you had a blog, what was her  
22 response?

23          *A.* At the meeting?

24          *Q.* Yes.

25          *A.* I also am quite certain that they were aware of the blog.

1 Q. How so? How do you know?

2 A. That is why they were calling the meeting, but they  
3 couldn't say that because that would be a violation of free  
4 speech.

5 MR. CURLEY: Objection, your Honor, nonresponsive.

6 THE COURT: Sustained. I will ask the jury to  
7 disregard the last portion of the witness' testimony.

8 BY MR. LEO:

9 Q. Going back to the memorandum, January 28th, that is on the  
10 monitor here, you said there was something else wrong with it  
11 or inaccurate.

12 A. Yes. The fourth paragraph.

13 Q. Do you see these arrows on here by any chance?

14 A. Yes.

15 MR. LEO: Your Honor, I am not too familiar with this  
16 system here.

17 THE COURT: Everyone should be seeing the same thing,  
18 the jurors are seeing it on their screen.

19 MR. LEO: I touched the screen, not realizing it.

20 THE COURT: That is a different story. I will tell  
21 you what, why don't we keep it for now and work it over the  
22 break.

23 It is not obstructing the view. Is it fair to say you  
24 don't intend for them to be there?

25 MR. LEO: Yes, your Honor.

1                   THE COURT: Ladies and gentlemen, this is a technology  
2 matter that we will take up during the noon hour. It is not  
3 part of the exhibit.

4 BY MR. LEO:

5 Q. Going back to what was wrong with the memorandum, can you  
6 tell us what was wrong, anything else?

7 A. Well, the second thing that was a concern was the fourth  
8 paragraph on the first page where the administrators, Heather  
9 Coltman specifically is asserting that my blogging is research  
10 activity.

11 Q. And what is wrong with that assertion?

12 A. Well, it is not. Some of the blog posts appeared at  
13 globalresearch.ca, which is another blog run by someone in  
14 Canada, and because of the title of the blog, Global Research,  
15 they were making an argument that this was scholarly research,  
16 that is what they were inferring.

17 Q. And what is your affiliation with Global Research, if  
18 anything?

19 A. They reposted some of the things that appeared on my site.

20 Q. Do you have editorial control over Global Research and what  
21 they post?

22 A. No.

23 Q. Is Global Research a compensated activity for you?

24 A. No.

25 Q. Have you ever been paid by Global Research for anything

1       they have republished from your blog?

2       A. Not at all.

3       Q. Are you an employee of Global Research?

4       A. No.

5       Q. What was your response to this accusation that Global  
6       Research was a professional activity or scholarly activity in  
7       the meeting?

8       A. I explained to Dean Coltman in a letter that I wrote a few  
9       days later that this is not the case, refuting this allegation  
10      as well as the one concerning the disclaimers that they claim  
11      were out there.

12      Q. This last paragraph that says, "I asked you whether or not  
13      you had completed and filed the report of outside  
14      employment/activity form required by the BOT/UFF collective  
15      bargaining agreement," do you see that?

16      A. Yes.

17      Q. "You replied that you had not. you should complete this  
18      form and return it to the director of SCMS for her approval by  
19      February 1, 2013.

20           Is that true, did they ask you in the meeting to submit a  
21      form?

22      A. I believe that was brought up peripherally, and this is  
23      something I spoke about with Douglas Broadfield who is the  
24      union representative.

25           MR. CURLEY: Objection, hearsay.

1                   THE COURT: Sustained.

2 BY MR. LEO:

3 Q. Without saying what you told Dr. Broadfield or what he  
4 said, what was your response to this directive?

5 A. I consulted with the union.

6 Q. And then what did you do?

7 A. I wrote a response based upon that consultation.

8 Q. And what was your response to this directive?

9 A. A letter --

10                  MR. CURLEY: Objection, your Honor, best evidence.

11                  THE COURT: Well, are you asking him -- you could do  
12 one of two ways, put the document in or he can testify how he  
13 recited --

14                  MR. CURLEY: That is the response, yes, your Honor.

15                  THE COURT: What is the exhibit number?

16                  MR. LEO: The response is Exhibit 6, your Honor.

17                  THE COURT: Has this been taken up?

18                  MR. LEO: He said no objection.

19                  THE COURT: Okay, are you seeking to admit it?

20                  MR. LEO: Yes.

21                  THE COURT: Exhibit 6 admitted without objection.

22                  (Whereupon Plaintiff Exhibit 6 was marked for evidence.)

23                  MR. LEO: For the record, I will show you what is  
24 marked Plaintiff's Exhibit 6.

25                  May we publish, your Honor?

1                   THE COURT: Yes, you may.

2 BY MR. LEO:

3 Q. Please disregard the arrows. Dr. Tracy, would you read  
4 your response? Do you mind?

5 A. No. Not at all.

6 Q. What is the date of the response?

7 A. February 22, 2013. I believe I received the memorandum  
8 January 30th, and responded shortly thereafter, three days  
9 later.

10                  "Dear Interim Dean Coltman, I am in receipt of your  
11 January 28, 2012 correspondence recounting our January 18  
12 meeting with Provost Alperin and Professor Broadfield in  
13 attendance. Thank you for your overview of the meeting.

14                  "Several observations in the letter overlook or  
15 misinterpret important points and/or information. This  
16 includes understanding of the UFF-FAU-BOT 2009-2012 collective  
17 bargaining agreement as it relates to non-professional  
18 activities.

19                  "Your letter states that our January 18 discussion should  
20 be recognized as distinct from, quote, free speech issues,  
21 unquote. In fact, free speech has very much to do with the  
22 situation not only as it relates to my teaching and research  
23 activities on campus, but most importantly as it relates to my  
24 own activities and endeavors off campus and unrelated to FAU.  
25 If I cannot expect to be able to practice free speech in my

1 personal life outside the classroom, then when exactly can I  
2 anticipate that my First Amendment guarantees will be realized?

3 Further, tenure was created to protect faculty from the  
4 political consequences that might otherwise attend speaking out  
5 on matters of public interest.

6 The January 28 letter references your request for proof  
7 that my memoryholeblog.com site included a disclaimer that the  
8 views expressed on the site are not representative of Florida  
9 Atlantic University or the state university system of Florida.  
10 There were inferences made at the January 18 meeting, in a  
11 telephone call you placed to my residence on the afternoon of  
12 January 18, and in your January 28 letter that no disclaimer  
13 exists on my site, or that it was abruptly added in  
14 December 2012. No evidence has been provided by you to  
15 substantiate this allegation. Nor is it noted in your letter  
16 that within 90 minutes of your January 18 phone call to my  
17 residence that evidence was provided via email, copy attached,  
18 with a link to an archived screen shot of memoryholeblog.com  
19 amply demonstrating that the site is personal and is in no way  
20 affiliated with FAU.

21 "The letter states that I have made, quote, numerous  
22 contributions to the Global Research site over the past few  
23 years, unquote. In fact, my first contribution to Global  
24 Research was on March 10, 2012. Further, my November 19, 2012  
25 email to School of Communication and Multimedia Studies

1 Director Naomi Marin does not state that articles contributed  
2 to Global Research are part of my research and scholarly  
3 activity assignment for the 2012-2013 academic year. As Dr.  
4 Broadfield and I explained to you at the meeting, and as i  
5 previously articulated in my November 19 email to Marin, this  
6 work does not constitute formal scholarship or research,  
7 although an article may at some future point provide the basis  
8 for a formal scholarly paper or journal article.

9 "In the November 19 email I state, quote, in addition to  
10 formal research, I am a biweekly contributor to  
11 GlobalResearch.ca. I intend to develop a scholarly project  
12 deriving from a contribution there in spring, unquote. I write  
13 numerous articles that appear on my personal blog, with some  
14 shared on GlobalResearch.ca. Most of these have nothing to do  
15 with a FAU or formal scholarly research, will not be designated  
16 as publications in any forthcoming annual review portfolio and  
17 will not be used for any future promotion case.

18 "You have recommended that I complete a, quote, report of  
19 outside employment/activity form, unquote, in accordance with  
20 the BOT/UFF collective bargaining agreement. This form is not  
21 required because my activities on a social medium such as a  
22 personal blog do not constitute professional practice and thus  
23 do not fall within the CBA's definition of, quote, reportable  
24 outside activity, unquote. Quote, reportable outside activity,  
25 unquote. According to CBA Article 19.2(a), shall mean any

1 compensated or uncompensated professional practice, consulting,  
2 teaching or research, which is not part of the employee's  
3 assigned duties and for which the university has provided no  
4 compensation, unquote.

5 Your letter recommends that I complete the outside  
6 employment/activity form and return it to the director of SCMS  
7 for her approval by February 1, 2013, unquote. The CBA does  
8 not state that the outside employment/activity has to be  
9 approved, only reported. There is no mechanism for approval of  
10 such activity by SCMS or its director.

11 Your letter expresses the FAU administration's concern over  
12 the safety of the institutions' students, faculty and staff.  
13 If the administration believes that the inordinate media  
14 attention afforded my public remarks poses a security concern  
15 for the university's constituents then it has the right to act  
16 on such concerns. Sincerely, James F. Tracy."

17 Q. Dr. Tracy, who helped you write the letter?

18 A. Michael --

19 MR. CURLEY: Objection, your Honor, hearsay, move to  
20 strike.

21 THE COURT: As to who helped him write the letter?

22 MR. CURLEY: Yes.

23 THE COURT: How that is hearsay, that question? I  
24 don't understand how that --

25 MR. CURLEY: I don't want to get into this in front of

1       the jury, your Honor. That is okay, I withdraw the objection.

2           *THE COURT:* You may answer the question, who helped  
3       you write the letter?

4       *BY MR. LEO:*

5       *Q.* Who helped you write the letter?

6       *A.* Michael Motes (phon) service director of United Faculty  
7       Florida. That is the union that represents the faculty at all  
8       public state universities in Florida as well as -- it is  
9       overseen by the Florida Education Association which represents  
10      all of the school teachers.

11      *Q.* Does this reflect the advisement of Michael Motes in 2013?

12      *A.* Yes, we had an extended discussion of this and this is  
13      reflective of that.

14           *MR. CURLEY:* Hearsay and move to strike.

15           *THE COURT:* I will sustain insofar as it is suggestive  
16      of what Mr. Motes may have said to the witness. The witness  
17      may testify about his actions, but not what someone else told  
18      him.

19       *BY MR. LEO:*

20       *Q.* Without testifying what Michael Motes said, did you follow  
21      Michael Motes' advisement in 2013 regarding this dispute over  
22      this outside employment activity form?

23       *A.* Yes.

24           *MR. LEO:* Your Honor, it is noon, I didn't know if  
25      your Honor wanted to break at this time. This would be a good

1 place.

2           THE COURT: If it is a convenient breaking point, that  
3 is fine. Is this a logical breaking point in the examination?

4           MR. LEO: Yes, your Honor.

5           THE COURT: Okay. All right. So, ladies and  
6 gentlemen, we will take our lunch break at this time. It is  
7 12:05, we will take a one hour lunch break. I ask you to be  
8 back at 1:05. Avoid anyone associated with the case as you  
9 come in and out of the courthouse, refrain from reviewing any  
10 media whatsoever regarding the case, refrain from any research  
11 regarding the case, discussions among yourselves or anyone else  
12 about the case. We will see you at 1:05.

13           I remind our witness you are to remain under oath and  
14 do not discuss your testimony with anyone on the break.

15           *(Thereupon, the jury leaves the courtroom.)*

16           THE COURT: Okay, you have been going an hour and nine  
17 minutes. What is your sense about your outline?

18           MR. LEO: I have about 25 pages left.

19           THE COURT: Okay.

20           MR. LEO: We are moving along quicker than I  
21 anticipated.

22           THE COURT: All right. We do lock the courtroom over  
23 the lunch hour, take whatever you need, otherwise it will be  
24 locked.

25           MR. CURLEY: Your Honor, before we break -- I

1 apologize if I interrupted.

2 If you guys want to give us any exhibits we haven't  
3 seen, we'll look at them.

4 Secondly, for impeachment exhibits that I might use  
5 tomorrow, how is your Honor going to handle -- how do we deal  
6 with that?

7 I know your Honor wants us to give the other side our  
8 exhibits in advance. Even impeachment exhibits?

9 *MR. BENZION:* Well, we are still working through  
10 Plaintiff's objections to Defendant's objections. The  
11 objections your Honor ruled upon were exhibits that we intended  
12 to introduce through the Plaintiff, and currently we don't have  
13 a list that they are going to use. We are looking at the  
14 entire exhibit list. I informed opposing counsel I intend to  
15 go through the objections and try to further narrow and give  
16 everybody an idea of, you know, what remains unresolved and  
17 what is resolved.

18 *THE COURT:* I would encourage you to continue that  
19 process and the goal and hope would be that all objections  
20 would be resolved and it would only be in the limited situation  
21 that there may be an exhibit or two that isn't resolved either  
22 by conferral or the Court's pronouncements of general rulings  
23 yesterday.

24 And maybe it would be the case that before  
25 cross-examination/direct examination by the Defendant, maybe it

1 will fall nicely that there will be a break and the isolated,  
2 isolated unresolved objections can be taken up at that time.

3 MR. CURLEY: One other thing, if I provide my  
4 exhibits, are they allowed to discuss them with Professor Tracy  
5 while they are in the middle of his testimony?

6 THE COURT: There should be no discussion with  
7 Professor Tracy, including his counsel. You are his counsel,  
8 you can be with him and talk with him. The rules are clear, we  
9 are to treat the break like he is on the stand, do not say what  
10 he said or should say, there is no discussion about his  
11 testimony, anything that he testified to or anything he may  
12 testify to, including any exhibits that the defense may  
13 introduce. Is that understood?

14 MR. BENZION: Yes.

15 THE COURT: That will be followed.

16 MR. BENZION: Yes, your Honor.

17 THE COURT: Okay, thank you.

18 (*Thereupon, a short recess was taken.*)

19 THE COURT: We have everybody here, Professor Tracy  
20 can take the stand, and we will bring our jury in.

21 (*Thereupon, the jury returns to the courtroom.*)

22 THE COURT: Okay, welcome back, everybody, be seated.

23 Our witness is still on the stand. Plaintiff's  
24 counsel may pick up with your direct examination.

25 MR. LEO: One moment, I want to publish the exhibit we

1 left off on, Exhibit 6.

2 *THE COURT:* Okay.

3 *BY MR. LEO:*

4 Q. Dr. Tracy, when we left off, we were discussing your  
5 response to Dean Coltman's January 28 memorandum which you sent  
6 February 2, 2013. In the letter you denied an obligation to  
7 submit a report, outside employment form for your personal  
8 blog; is that correct?

9 A. Yes.

10 Q. Regarding this form, let me show you what is marked as  
11 Plaintiff's 15.

12 *MR. CURLEY:* No objection.

13 *THE COURT:* 15 is admitted without objection.

14 (Whereupon Plaintiff Exhibit 15 was marked for evidence.)

15 *MR. LEO:* May I publish?

16 *THE COURT:* Yes.

17 *BY MR. LEO:*

18 Q. Is that the form you referred to in your letter of February  
19 2nd, 2013?

20 A. Yes.

21 Q. Can you tell the jury what the form is, your understanding  
22 of it?

23 A. This is a form, a document designed by the Florida Atlantic  
24 University administration concerning their policy, outside  
25 activities policy, which is based upon Article 19 of the

1       collective bargaining agreement.

2       Q. You said it was designed by the university. Who created  
3       the form?

4       A. The university administration, those that would be in  
5       charge of producing such a document.

6       Q. Is Plaintiff's Exhibit 15, this document entitled Report of  
7       Outside Employment for Professional Activity, is this part of  
8       the collective bargaining agreement of FAU?

9       A. No.

10      Q. Was this form, this document something that was bargained  
11       for by you at any time?

12      A. No.

13      Q. Was it bargained for by the union?

14      A. No.

15      Q. The document here, Exhibit 15, how long has this been in  
16       use by the university, if you know?

17      A. I would say for the past several years.

18      Q. Do all faculty members -- or are all faculty members  
19       required to submit these forms?

20      A. No.

21      Q. How do you know that?

22      A. Well, I am in touch with various faculty members in my  
23       departments and college who undertake outside activities.

24                    MR. CURLEY: Objection, hearsay. We need a  
25       foundation, your Honor, personal knowledge.

1       *BY MR. LEO:*

2       *Q.* Dr. Tracy, do you have personal knowledge whether all  
3       faculty members actually turn in these forms?

4       *A.* Yes.

5       *Q.* What is it based on, to your knowledge?

6       *A.* It is based upon a document request that I did in this  
7       ongoing litigation.

8       *Q.* And what did that request reveal?

9                   *MR. CURLEY:* Objection, your Honor, hearsay.

10                  *THE COURT:* If it is going to go to the content of the  
11       documents, it would be hearsay.

12       *BY MR. LEO:*

13       *Q.* Did you request documents from the university -- I am  
14       sorry, these forms from the university for a faculty member?

15       *A.* Yes.

16       *Q.* Did you receive forms for all of the faculty members you  
17       requested forms for?

18       *A.* No.

19                   *MR. CURLEY:* Hearsay and relevance.

20                  *THE COURT:* Overruled as to relevance and overruled as  
21       to hearsay. As to the question whether the witness received  
22       forms for all of the faculty members he requested them for, you  
23       can answer that question.

24       *BY MR. LEO:*

25       *Q.* Going back to this form, if you could look at it, does this

- 1 form reference Article 19?
- 2 A. It references Chapter 112, Florida Statutes.
- 3 Q. Does the collective bargaining agreement require you to
- 4 fill out this form without condition?
- 5 A. No.
- 6 Q. Does the collective bargaining agreement reference this
- 7 form in any way, professional activity for FAU employees form?
- 8 A. No. But the CPA is referenced on the form.
- 9 Q. Would a blog be reported on a form like this?
- 10 A. No.
- 11 Q. Why is that?
- 12 A. Because it is not professional activity or employment.
- 13 Q. Where on this form would one put a personal blog?
- 14 A. I don't know. I think that would likely leave one in a
- 15 quandary.
- 16 Q. Is there a place on the form for blogging?
- 17 A. No.
- 18 Q. Where on the form does it ask you to set forth
- 19 uncompensated activity?
- 20 A. I do not see, it says description of employment activity.
- 21 Q. Do you see where it says proposed slash employment
- 22 activity?
- 23 A. Yes.
- 24 Q. Is there a check box for uncompensated activity?
- 25 A. It says other compensated activity? No.

1 Q. Does the university define uncompensated activity?

2 A. No.

3 Q. Does the university define compensated activity, if you  
4 know?

5 A. No.

6 Q. Are there guidelines with respect to the completion of the  
7 reported outside employment or professional activity form,  
8 Exhibit 15?

9 A. At what time?

10 Q. Well, let's go back to 2013. Were there any guidelines  
11 provided to you which would assist you in completing this form,  
12 perhaps instructions on how to fill this form out?

13 A. No.

14 Q. Did you receive training -- let's go back before 2013. Did  
15 you ever receive training from the university on how to  
16 complete this form?

17 A. No.

18 Q. Did your supervisor ever hold informational sessions or  
19 training sessions where the faculty can come in and ask  
20 questions about this form particularly?

21 A. No.

22 Q. And was there ever any kind of instructions from your  
23 supervisors back in 2013 to put a specific activity on this  
24 form?

25 A. No.

1 Q. What were the instructions that you were provided with  
2 respect to this form in 2013, if any?

3 A. None.

4 Q. You were asked to submit the form in 2013?

5 A. Yes.

6 Q. But you were never told what to put on the form; is that  
7 correct?

8 A. Correct.

9 Q. And after 2000 -- let's go to your response.

10 You wrote to Dean Coltman on February 2nd, 2013 denying an  
11 obligation to turn in this form for your blog; isn't that  
12 correct?

13 A. I am sorry, could you repeat that?

14 Q. We just had your response up here.

15 A. Yes.

16 Q. And you denied an obligation to submit this form for your  
17 blog; is that correct?

18 A. That is correct.

19 Q. And you sent that letter to who?

20 A. To Heather Coltman who was dean, and present at the meeting  
21 on January 18, 2013.

22 Q. How did you send it to her?

23 A. I sent it first class mail.

24 Q. And it was received?

25 A. Yes.

1 Q. Did Dean Coltman respond to this letter after you sent it  
2 to her?

3 A. No. I was reprimanded.

4 Q. Before you were reprimanded, I want to talk about the time  
5 following this letter. Let's talk about February 2013. You  
6 sent this letter February 2nd?

7 A. Yes.

8 Q. Any time between February 2nd and the beginning of March,  
9 did you receive a response to this letter?

10 A. No.

11 Q. Did Heather Coltman bring you into her office and say I  
12 need to talk to you about this letter that you sent?

13 A. No.

14 Q. Did any of your supervisors talk to you about your response  
15 denying the obligation to submit this form for your blog?

16 A. At what time?

17 Q. In that time period, February 2nd to the beginning of March  
18 2013.

19 A. No.

20 Q. Let's expand that. Any time between February 2nd and the  
21 rest of the year, 2013, did you receive a response to this  
22 letter saying, Dr. Tracy, you are wrong, you need to turn in  
23 your form for your blog from the university?

24 A. No.

25 Q. You said you were reprimanded. Were you reprimanded for

1       not turning in this form as you were directed on January 28,  
2       2013?

3       A. No.

4       Q. What were you reprimanded for?

5       A. I was reprimanded for not having what was deemed to be a  
6       proper disclaimer on the blog.

7       Q. And do you remember the date that you were reprimanded?

8       A. 28th of March, 2013.

9       Q. And in this reprimand, was there any mention of the refusal  
10      to submit this form for your blog on February 2nd, 2013?

11      A. No.

12      Q. You weren't disciplined for insubordination, is that what  
13      you are saying?

14      A. That is what I am saying.

15      Q. You referenced guidelines. Are you referencing guidelines  
16      to the policy?

17      A. Yes.

18      Q. I show you Plaintiff's Exhibit 13.

19                  MR. CURLEY: No objection.

20                  THE COURT: Plaintiff's Exhibit 13 admitted without  
21      objection.

22                  (Whereupon Plaintiff Exhibit 13 was marked for evidence.)

23                  MR. LEO: Can we publish, your Honor?

24                  THE COURT: Yes.

1       BY MR. LEO:

2       Q. What is Plaintiff's Exhibit 13, can you tell the jury?

3       A. Report of outside employment guidelines.

4       Q. And are these guidelines something that you bargained for?

5       A. No.

6       Q. Are these guidelines something that the collective  
7 bargaining agreement contained within the agreement?

8       A. No.

9       Q. Who created these guidelines?

10      A. The Florida Atlantic University administration.

11      Q. Was there any training at the university concerning these  
12 guidelines reflected in Plaintiff's Exhibit 13 at any time?

13      A. At no time that I am aware of.

14      Q. Your supervisor never contacted you and said I would like  
15 to sit down and talk to you about the guidelines at any time?

16      A. No.

17      Q. With respect to these guidelines, looking -- if you want to  
18 look with me through page one, page one, page two, there are  
19 several forms and regulations, it appears, referenced on these  
20 first two pages. Do you see that?

21      A. Yes.

22      Q. Now, I notice the collective bargaining agreements, some of  
23 the articles are referenced in here as well. Do you see A 10,  
24 A 11, A 12?

25      A. Yes.

1 Q. These other documents, regulations, are those contained  
2 within the collective bargaining agreement at FAU?

3 A. No.

4 Q. These other forms, these other regulations, were these  
5 bargained for that are reflected in this agreement?

6 A. Not that I am aware of, no.

7 Q. Can you scroll up a little bit more. We figured out how to  
8 work this. Scroll down, I am sorry.

9 Starting with A 1, let's go one by one.

10 Is university regulation 5.011, is that part of the  
11 collective bargaining agreement?

12 A. No.

13 Q. Who created that regulation?

14 A. That would be the upper level of administration of Florida  
15 Atlantic University.

16 Q. Is that something you agreed to in your collective  
17 bargaining agreement?

18 A. No.

19 Q. How about university regulation 5.010, was that something  
20 you bargained for?

21 A. No.

22 Q. Going down here to A 5, report of outside employment, do  
23 you see that has a hyper link down there?

24 A. Yes.

25 Q. Do you see the monitor, too?

1 A. Yes.

2 Q. And it says outside business V2?

3 A. Yes.

4 Q. Is that referring to this form, Plaintiff's 15, if you  
5 know?

6 A. Yes.

7 Q. It is called outside business form. Is that one way to  
8 describe that by the university, the form?

9 A. It goes by a number of names depending on who you are  
10 talking to at the university.

11 Q. Can you tell me how many different names you are aware of  
12 this form or policy is referred to as?

13 A. Outside activities form, outside employment form, outside  
14 business form, those are the most prevalent.

15 Q. Which is the most frequently used term to describe this  
16 form and this policy by the university?

17 A. Outside employment form, that is how it is understood.

18 Q. Can you explain that? How is it understood?

19 MR. CURLEY: Objection, your Honor. He can speak on  
20 behalf of himself, but not everybody else.

21 THE COURT: Yes.

22 BY MR. LEO:

23 Q. How do you understand the form?

24 A. As I have done previously, summarized, if someone is  
25 employed outside of the university or self-employed with their

1 own business entity, they are required, under the policy and  
2 under the collective bargaining agreement, to report as a state  
3 employee under Florida Statute 112. It is part of an ethical  
4 responsibility of employees. There could be a financial  
5 interest which is of the foremost concern of the State of  
6 Florida.

7 Q. Talking about the interest of the State of Florida, where  
8 in Article 19 or in the guidelines does it set forth the  
9 interests of the State of Florida?

10 A. It does not that I am aware of.

11 Q. How about the interests of the university, are the  
12 interests of the university set forth or defined perhaps in  
13 these guidelines? If you want to take a look.

14 A. I cannot see where it is defined.

15 Q. Where in the guidelines does it require the reporting of  
16 blogging?

17 A. Nowhere.

18 Q. Turn your attention to page seven under subsection -- it  
19 looks like 3(a), reporting requirements.

20 A. Okay.

21 Q. If I could draw your attention to paragraph three, do you  
22 see that?

23 A. Yes.

24 Q. Do you see how it says uncompensated activities and  
25 financial interests may also need to be reported if they fall

1 under any of the categories described below?

2 A. Yes.

3 Q. And it also says an employee must report any compensated  
4 outside activity or financial interest which has the potential  
5 to create a conflict, including a conflict of commitment.

6 With respect to what is said here, was there any training  
7 or guidance provided by the university with respect to what it  
8 is saying right here in this paragraph?

9 A. None that I am aware of.

10 Q. So, what uncompensated activities are you aware of that  
11 have to be reported?

12 A. It is difficult to say.

13 Q. Was there ever any guidance from your superiors on what  
14 uncompensated activities are being targeted here?

15 A. No.

16 Q. With respect to what is at the bottom of page seven here,  
17 it says the following outside activities and financial  
18 interests must be reported and approved prior to engaging in  
19 the activity in this list here we just scrolled through.

20 Would any of these categories involve blogging?

21 A. No.

22 Q. How about podcasting, is there anything in this list that  
23 would require podcasting to be reported?

24 A. No.

25 Q. In 2013, did you understand whether your blog was a

1 reportable outside activity?

2 A. In 2015?

3 Q. 2013, did you understand it was a reported activity or not?

4 A. My understanding was it was not.

5 Q. Why not?

6 A. Because I am not being compensated in any way. I am not  
7 employed by my blog, it is not a professional activity of any  
8 type.

9 Q. And where in this guideline here does it actually define  
10 professional activity, that term you just used?

11 A. It is not defined.

12 Q. So, how would you know what to report if it is not in your  
13 guidelines?

14 A. This is something where there was a great deal of  
15 perplexity on my behalf, as well as on behalf of colleagues.

16 Q. Do you think it is important for faculty members at the  
17 university to understand what activities are reportable?

18 MR. CURLEY: Objection, your Honor. Again, he can  
19 speak on his own behalf, not the rest of the university.

20 THE COURT: Yes, you can rephrase.

21 BY MR. LEO:

22 Q. Was it important for you, Dr. Tracy, to understand what  
23 outside activities were reportable?

24 A. Absolutely, and I have attempted to do so in every way  
25 possible.

1 Q. Who did you ask at the university in 2013 for  
2 clarification, if anyone, about what is reportable and what is  
3 not?

4 A. This is something that I expressed in my February 2nd, 2013  
5 letter.

6 Q. And did the university, whether it was through Dean Coltman  
7 or Vice Provost Alperin in 2013, did they try to help you  
8 understand this policy better?

9 A. No.

10 Q. And you said you were disciplined.

11 MR. LEO: Your Honor, I am going to show the witness  
12 Plaintiff's 8.

13 MR. CURLEY: No objection.

14 THE COURT: 8 is admitted without objection.

15 (Whereupon Plaintiff Exhibit 8 was marked for evidence.)

16 MR. LEO: May I publish, your Honor?

17 THE COURT: Yes.

18 BY MR. LEO:

19 Q. Dr. Tracy, what is number 8?

20 A. This is the affirmation notice of discipline from Dean  
21 Heather Coltman.

22 Q. It is dated March 28, 2013. You said that nowhere in this  
23 discipline was your refusal to submit the form for your blog  
24 mentioned?

25 A. Nowhere in this document, no.

1 Q. What were you being disciplined for?

2 A. This was concerning the disclaimer on my personal blog.

3 Q. Was there anything in this notice that you disagreed with  
4 or was inaccurate? You can take a moment to read through.

5 A. Thank you. There is reference to the January 18, 2013  
6 meeting between myself, Provost Alperin and Dean Coltman.

7 Q. Which paragraph are you referring to?

8 A. The second paragraph. "During the meeting, you were  
9 adamant that your blog postings and related activities were  
10 personal, not work related, and not connected with FAU."

11 Q. Is that a true or false statement?

12 A. That is true.

13 Q. You can continue.

14 A. "We discussed your obligations in CBA Article 5.3(d)  
15 regarding such personal activities. We required, and you  
16 agreed that references to FAU or your position at FAU would not  
17 be included on your memory hole blog site. We also agreed that  
18 you would post disclaimers on the site to comply with your  
19 obligation to make clear that the views expressed by you are  
20 not representative of FAU."

21 This misrepresents the proceedings of the meeting because  
22 as they --

23 Q. Let me back up. What in here misrepresents -- what is  
24 false, which statement? Is it that we required and you agreed?

25 A. "We required, and you agreed that FAU would not be

1 included. We also agreed that you would post disclaimers on  
2 the site to comply with your obligation to make clear that the  
3 views expressed by you are not representative of FAU."

4 Well, this suggests that I had not had a proper disclaimer  
5 on the blog, which was not the case. In fact, the disclaimer  
6 on the blog existed on the blog in March 2012.

7 Q. When Dean Coltman says "we required and you agreed," that  
8 is not true?

9 A. No.

10 Q. There was no agreement on January 18, 2013 that you would  
11 not include references to FAU or your position at FAU?

12 A. They asked about the disclaimer and I said it is on there,  
13 it has been on there for most of the time. They went and  
14 looked, and still questioned it.

15 Q. Was there an agreement -- on that day, January 18, 2013,  
16 did you agree that references to FAU or your position at FAU  
17 would not be included on your blog?

18 A. No.

19 Q. That never happened?

20 A. No.

21 Q. What else, if anything, is incorrect in this paragraph?

22 A. As I mentioned, the disclaimer, statements about  
23 disclaimer. "The disclaimer you had at the time of our meeting  
24 was solely on the About page and not where the articles and  
25 postings are found and read. Clearly this disclaimer was

1       ineffective, as shown by the widespread misperception that your  
2       job and FAU are connected to the blog site."

3       Q. That is not correct?

4       A. I believe that there couldn't have been an agreement of the  
5       disclaimer, about putting another one on there. I didn't  
6       really understand how to proceed.

7                  The disclaimer at that time was on the blog, but it was in  
8       fact on the page.

9       Q. If I could direct your attention to the last paragraph. It  
10      says, "You have ignored your obligations under Article 5.3(d)  
11      and my directives." Is that true?

12      A. No.

13      Q. What is Article 5.3?

14      A. It is from the collective bargaining agreement and it  
15      involves activity --

16                  MR. LEO: Your Honor, I would ask to admit 55.

17                  THE COURT: Are you seeking to have it admitted?

18                  MR. LEO: Yes.

19                  MR. CURLEY: No objection.

20                  THE COURT: 55 admitted without objection.

21                  (Whereupon Plaintiff Exhibit 55 was marked for evidence.)

22                  MR. LEO: May I publish, your Honor?

23                  THE COURT: Yes.

24      BY MR. LEO:

25      Q. Is this Exhibit 55 the Article 5 that you referenced?

- 1 A. Academic freedom and responsibility, yes.
- 2 Q. If you scroll down to 5.3, she said 5.3(d)?
- 3 A. Yes.
- 4 Q. You ignored your obligations under 5.3(d). Could you read
- 5 5.3(d)?
- 6 A. "Recognizing that faculty, as members of the community,
- 7 have rights and duties, when speaking on any matter of public
- 8 interest a faculty member shall make clear when comments
- 9 represent personal opinions and when they represent official
- 10 university positions."
- 11 Q. Did you do that, Dr. Tracy?
- 12 A. Yes.
- 13 Q. Where in Article 5 does it say you are required to have a
- 14 disclaimer on a blog?
- 15 A. Nowhere.
- 16 Q. In 2013, you had a disclaimer on your blog?
- 17 A. Yes.
- 18 Q. Prior to 2013?
- 19 A. Yes, from the blog's inception.
- 20 Q. Did that satisfy your obligations under Article 5.3(d)?
- 21 A. Yes.
- 22 Q. What did you do after you received this notice of
- 23 discipline on March 28, 2013?
- 24 A. I received this, I believe by certified mail at my
- 25 residence, and I immediately telephoned my union

1       representatives, and emailed them as well a copy of the  
2 discipline notice.

3       Q. What was the union response, without telling me what they  
4 said, to this notice of discipline?

5       A. That this is something that was grievable and something  
6 that was wrong and in violation of the collective bargaining  
7 agreement.

8       Q. Did the union file a grievance?

9       A. Yes.

10      Q. Going to this grievance process, did you file a grievance?

11      A. No.

12      Q. Who filed a grievance?

13      A. United Faculty of Florida have faculty designated as  
14 officers on each university campus, I was the president at one  
15 time. We have a grievance chair in each chapter, that person  
16 is kind of like an attorney or a legal representative that is  
17 there to enforce the contract. So, that is one of the reasons  
18 that faculty members pay dues, it is one of the selling points,  
19 if you will, of the --

20            MR. CURLEY: Objection, nonresponsive, your Honor.

21            THE COURT: Well, he is explaining who filed a  
22 grievance, and I suppose -- I will overrule.

23          BY MR. LEO:

24          Q. With respect to the grievance process, the grievance is a  
25 piece of paper, do you know?

- 1 A. Yes. It is an appeal.
- 2 Q. Who actually files the grievance?
- 3 A. The grievance or contract enforcement chair.
- 4 Q. Have you, yourself, ever filed a grievance on your own?
- 5 A. No.
- 6 Q. Why not?
- 7 A. Because we had someone designated in the union that was  
8 versed in this. It was someone who was specially aware of the  
9 collective bargaining agreement and its many facets and is more  
10 than capable of handling these things.
- 11 Q. It has come up that you were the president of the union at  
12 some point; is that correct?
- 13 A. Yes.
- 14 Q. At this time, what capacity, if any, did you have with  
15 respect to the faculty union?
- 16 A. At the time I was a Senator, I believe, in the faculty  
17 union.
- 18 Q. You weren't the president at the time?
- 19 A. No.
- 20 Q. Does the president of the FAU UFF union, does the president  
21 file grievances?
- 22 A. No. It would be like Donald Trump doing work with Jeff  
23 Sessions.
- 24 Q. It is delegated?
- 25 A. Yes.

1 Q. Going to the grievance filed by your union in response to  
2 the March 28 notice of discipline, when was that filed, if you  
3 know?

4 A. It was on or around the 25th of April, 2013.

5 Q. Did you receive any other support concerning defense  
6 against this March 28, 2013 notice of discipline?

7 A. Yes.

8 Q. Who did you receive support from?

9 MR. CURLEY: Objection, hearsay, your Honor, and 403.

10 THE COURT: Well, are you going to ask who provided  
11 the support without getting into the content of the support?

12 MR. LEO: Yes, your Honor.

13 THE COURT: What is the response?

14 MR. CURLEY: We probably should be heard on this.

15 THE COURT: Without getting into a speaking objection,  
16 alert the Court what is the issue.

17 MR. CURLEY: I don't think I can explain it without  
18 saying more than you want me to say.

19 THE COURT: Can counsel move on or do you need to have  
20 this question answered?

21 MR. LEO: This is an important area.

22 THE COURT: We will go sidebar.

23 Ladies and gentlemen, sometime we need to hear  
24 something outside your hearing. I will meet with the attorneys  
25 sidebar for a moment to see if the issue can be resolved

1 expeditiously.

2 (Proceedings at sidebar.)

3 THE COURT: Okay.

4 MR. CURLEY: I think we are heading into the FIRE  
5 letter that you excluded last night, your Honor.

6 MR. BENZION: I was going to respond. My notes from  
7 your ruling last night was that this letter --

8 THE COURT: No. No. The letter can't come in.

9 MR. BENZION: Right, and I wrote down accomplish the  
10 same goal, question the witness about the letter.

11 MR. LEO: We don't want to introduce the letter  
12 itself, we want to talk about the support group which shaped  
13 his state of mind through 2015. This is a state of mind, this  
14 is not being offered --

15 THE COURT: So, let me understand. The question is,  
16 did anyone support you in filing a grievance?

17 MR. LEO: In defense of the discipline.

18 THE COURT: In defense of the discipline. You expect  
19 the witness to answer yes.

20 MR. LEO: Foundation of Education, American  
21 Association of University Professors, we expect him to say he  
22 did receive support from a constitutional rights group and the  
23 affect it had on him to support that he felt his rights are  
24 being violated.

25 THE COURT: You are not getting into the content.

1                   MR. LEO: No, we do not wish to introduce it into  
2 evidence.

3                   THE COURT: What is the response?

4                   MR. CURLEY: They are getting into the content of it,  
5 they are talking about constitutional rights groups. This is  
6 state of mind evidence for Professor Tracy, I think that has  
7 been briefed as well. At best, whether other people think he  
8 is right or wrong is not the issue here, it is what is in the  
9 minds of the decision makers, and it is highly prejudicial.

10                  Any minuscule probative value is outweighed by the  
11 prejudice this would cause.

12                  MR. LEO: If I could respond briefly. I understand  
13 the Court ruled that Plaintiff's objective belief why he was  
14 terminated is not relevant, but what Plaintiff believed in 2013  
15 when he was faced with this discipline that was met with  
16 opposition not just from his union, but two civil rights  
17 groups, which are significant groups. The letter was sent not  
18 just to him, but to the university as well, and was an impact  
19 on him how he conducted himself from 2013 through 2015.

20                  THE COURT: I will sustain the objection. I don't  
21 think it is necessary to identify the group by name.

22                  I do think the probative value is outweighed by the  
23 potential of prejudice and confusion when you bring in  
24 organizations that have names such as civil rights and  
25 Constitution and invokes issues that shouldn't be invoked in

1           that way.

2           If you want him to testify that he received a letter  
3 and that made him think that, you know -- of support, and made  
4 him think further he had a viable basis to contest the  
5 discipline, but I don't want to bring in the names of the  
6 organizations, it is unnecessary and has the potential to  
7 confuse and is prejudicial.

8           *MR. LEO:* Is it okay if I ask a question that he not  
9 say the names?

10          *THE COURT:* Without saying the names, did you receive  
11 support, yes. What effect did that have on you, if any?

12          *MR. BENZION:* Basically, he cannot say he received  
13 support from constitutional issues.

14          *MR. CURLEY:* They need to tell him that.

15          *THE COURT:* Maybe you want to stay away from the  
16 question.

17          *MR. LEO:* It is such a significant profound impact  
18 that these letters had and, your Honor, these letters --

19          *THE COURT:* Is there any objection to having Professor  
20 Tracy coming over here?

21          *MR. CURLEY:* None.

22          *MR. LEO:* No, it might be important.

23          Dr. Tracy, can you come here?

24          *THE COURT:* Why don't you proffer the question so Dr.  
25 Tracy knows how he can and cannot answer.

1           MR. LEO: May I clarify?

2           THE COURT: Yes.

3           MR. LEO: The judge ruled we may not say the name of  
4 the constitutional rights groups who wrote letters to you.

5           MR. BENZION: That is not all, you cannot say it was a  
6 constitutional rights group.

7           THE COURT: Right. Just a letter.

8           MR. LEO: Only testify that you received the letters  
9 and what effect, if any, it had on you.

10          THE COURT: No mention of the names of the group or  
11 that they have affiliation with civil rights organizations.  
12 You may or may not have received letters and they may or may  
13 not have an impact on you.

14          (Sidebar concluded.)

15          THE COURT: You may proceed.

16 BY MR. LEO:

17 Q. Dr. Tracy, did you receive letters in support of your  
18 defense of this notice of discipline and after receiving the  
19 notice of discipline in 2013?

20 A. In April of 2013, yes.

21 Q. What effect did those letters have on you, if any?

22 A. It galvanized my belief that I was correct in my assertions  
23 that the disclaimer on my blog was sufficient and satisfactory.

24 Q. Did anyone else receive the letters, if you know?

25 A. Yes.

1 Q. Who?

2 A. Who were the letters cc'd to?

3 Q. Yes.

4 A. Dean Heather Coltman and Provost Diane Alperin and several  
5 members of the Florida Atlantic University Board of Trustees,  
6 and President Saunders, who was at the time President of  
7 Florida Atlantic University, Mary Saunders.

8 Q. How was the issue of the discipline resolved?

9 A. The grievance was filed, as I mentioned, on or around  
10 April 25th of 2013, and FAU administration fought the grievance  
11 for several months.

12 Q. So, after these letters came, there was no withdrawal of  
13 the discipline?

14 A. No.

15 Q. Did the university withdraw the discipline or how was it  
16 resolved?

17 A. There was a settlement agreement forged in September of  
18 2013, so five months following the filing of the grievance.

19 MR. LEO: Your Honor, I would like to show the witness  
20 what is marked Plaintiff's Exhibit 7. No objection?

21 MR. CURLEY: Number 7, no objection.

22 THE COURT: Admitted without objection.

23 (Whereupon Plaintiff's Exhibit 7 was marked for evidence.)

24 MR. LEO: May we publish, your Honor?

25 THE COURT: Yes.

1       BY MR. LEO:

2       Q. Dr. Tracy, can you tell the jury what Exhibit 7 is?

3       A. This is the aforementioned settlement agreement, September  
4       2013, concerning the grievance that was filed on the notice of  
5       discipline on 3/28/2013.

6       Q. What were the two things that you had to do with respect to  
7       this agreement?

8       A. The FAU administration fashioned a disclaimer to their  
9       liking for me to post on my blog and they stated that I could  
10      no longer use my university title in anything online or  
11      elsewhere.

12      Q. It says here you won't use your title in the public  
13      postings or communications unless the statements are those of  
14      the university and/or prior approval has been given?

15      A. Yes.

16      Q. That is under 1 here. It says, this includes all postings  
17      to your personal blog, comments to your own blog, other blogs,  
18      Twitter feed and other social media or other media outlet; is  
19      that correct?

20      A. Yes.

21      Q. Did you follow that after this agreement was entered?

22      A. Yes.

23      Q. Going to the second one, disclaimer, you said that they  
24      crafted it for you?

25      A. That's -- that concerns the disclaimer, yes.

1 Q. Let me get this straight. The university rewrote your  
2 disclaimer for your blog?

3 A. They wrote an entirely new one.

4 Q. Did you use that disclaimer?

5 A. Yes.

6 Q. What did the university have to do?

7 A. They were required, for the settlement agreement, to remove  
8 the 3/28/13 notice of discipline.

9 Q. And after the agreement was entered, did the university  
10 remove the discipline from your university personnel file?

11 MR. CURLEY: Objection, your Honor.

12 THE COURT: You can inquire whether he has any  
13 knowledge of that.

14 BY MR. LEO:

15 Q. Do you know if the university removed the March 28, 2013  
16 notice of discipline, Exhibit 8?

17 A. I know they did not remove it.

18 Q. How do you know that?

19 A. I requested my personnel file in 2016.

20 Q. And what was inside that file?

21 A. The notice of discipline that was also produced to the  
22 media.

23 Q. Going back to what the university required of you, are you  
24 aware of any faculty members of the university who are not able  
25 to use their work title on their postings online?

1 A. No.

2 Q. Are you aware of any faculty not allowed to use their work  
3 title on their blog?

4 A. No.

5 Q. On their Twitter feed?

6 A. No.

7 Q. Or social media in any form?

8 A. No.

9 Q. Are you aware of any other faculty at the Defendant  
10 university who are required to use a disclaimer written by the  
11 university on their blog?

12 A. No.

13 Q. Or on any social media or online publications?

14 A. I am not aware.

15 Q. Where in the collective bargaining agreement does it  
16 require you to use a disclaimer that the university approves?

17 A. There's nothing in the collective bargaining agreement in  
18 that regard.

19 Q. Where does it say you cannot use your work title?

20 A. Nowhere.

21 Q. And with respect to the settlement that was entered, what  
22 was your understanding concerning the -- this directive from  
23 Dean Coltman as to your not turning in a form for your blog?

24 A. Could you rephrase, please?

25 Q. What was your understanding as to the effect this

1 settlement agreement had concerning the directive for you to  
2 turn in a form for your blog? Did you believe that was --

3           MR. CURLEY: Objection, your Honor, leading and  
4 misstates the evidence.

5           THE COURT: Restate the question.

6           MR. CURLEY: Best evidence, too, your Honor.

7 BY MR. LEO:

8 Q. Was there an understanding you had from the settlement  
9 agreement as to whether or not the issue concerning your --  
10 this form that you had turned in for your blog, is there an  
11 understanding you had from the settlement agreement?

12 A. Outside activities form.

13 Q. Remember she asked you to turn the form in for your blog?

14 A. Right.

15 Q. Did you think this settlement agreement resolved that?

16 A. There was no discussion of outside activity forms, so I was  
17 led to conclude that I was in the right, that that was not a  
18 problem or an issue.

19 Q. And after the settlement agreement was entered -- I am  
20 sorry, the date on this is what date?

21 A. It should be at the bottom.

22 Q. What is the date of this?

23 A. 26th of September, 2013.

24 Q. After September 26, 2013, any time in 2013, were you  
25 disciplined for not turning in a form for your blog?

1 A. No.

2 Q. How about 2014? In 2014, were you disciplined for not  
3 turning in a form for your blog?

4 A. No.

5 Q. Did you ever receive another directive from your  
6 supervisors that you haven't submitted your form for your blog,  
7 you need to do that, something like that, in 2014?

8 A. No.

9 Q. Was there any discipline in 2014 against you?

10 A. No.

11 Q. Going back to 2013, was there anything else that happened  
12 at the university concerning your blogging?

13 A. Yes.

14 Q. And what was that?

15 A. A course that I had scheduled for -- excuse me, the  
16 university administration, Associate Dean Linda Johnson was in  
17 charge of scheduling classes, along with the then chair person  
18 of the school of education multimedia studies, Naomi Marin.  
19 They designed a class that I was assigned to teach called Media  
20 War Crisis, and that was slated to be taught in the fall of  
21 2013. In April of 2013, that class was pulled, which is  
22 unusual because there would not have been an opportunity for  
23 the class to fill until late August -- excuse me, late July or  
24 early to mid August, at which time students are prevalently  
25 enrolling, so that was suspect.

1 Q. You said the course was canceled?

2 A. Yes.

3 Q. What was the name of the course?

4 A. Media War Crisis.

5 Q. Were you provided with an explanation why the course was  
6 canceled?

7 A. No. I was -- I was, I believe, provided with an excuse.

8 Q. What was the excuse?

9 A. That I needed to teach something else and that was -- I was  
10 rescheduled to teach Introduction to Multimedia Studies in the  
11 day time, which was unusual. I had had an agreement previously  
12 with the department because I am a stay-at-home dad and child  
13 care for my son, my wife works 8:00 to 5:00 --

14 MR. CURLEY: It's getting into nonresponsive areas,  
15 your Honor.

16 MR. LEO: Your Honor, if I may respond. The question  
17 that started this is what happened as a result of your  
18 blogging.

19 THE COURT: Right. Right now we are talking about the  
20 course is canceled and what the witness was told.

21 So, he can answer what he was told.

22 BY MR. LEO:

23 Q. Let's talk about what you just referenced.

24 There was a time change in your classes?

25 A. Yes.

1 Q. And can you describe the change to your scheduling for the  
2 jury?

3 A. Well, yes, in late 2005, our first child was born and I was  
4 aiding in child care at home. From 2006 until at this time,  
5 2013, my classes were scheduled in the evening and the director  
6 of the school of communication and multimedia studies, Director  
7 Susan Riley, had an understanding in that regard, and suddenly  
8 in the fall of 2013 my classes were rescheduled.

9 Q. When in the fall, do you remember the month?

10 A. Classes begin mid to late August.

11 Q. So it would have been canceled in the summer?

12 A. The class was canceled in April.

13 Q. How do you know --

14 MR. CURLEY: Your Honor, this is all speculative,  
15 there is no foundation for this.

16 THE COURT: Well, the witness can state what he has a  
17 personal knowledge of, his class was canceled in April, 2013.  
18 Stick to what the witness has personal knowledge of as to what  
19 happened.

20 BY MR. LEO:

21 Q. How do you know your class was canceled in April, if you  
22 know?

23 A. It was online and suddenly it disappeared and I was  
24 reassigned classes, which is fine, I have no problem teaching  
25 the other classes, but I was looking forward to it, as is the

1 case with any other faculty that post a new course and they can  
2 examine material to teach that course.

3 Q. In 2013, after the settlement agreement, did you turn in  
4 the form for your blog?

5 A. No.

6 Q. How about 2014, did you turn in the form for your blog in  
7 2014?

8 A. No. And concerning your previous question --

9 MR. CURLEY: There is no question pending.

10 THE COURT: Yes, I will have the witness wait until  
11 the next question.

12 BY MR. LEO:

13 Q. In 2013, did anybody accuse you of being insubordinate?

14 A. No.

15 Q. How about 2014, were you accused of being insubordinate in  
16 2014?

17 A. No.

18 Q. Was there anything else that happened in 2013 as a result  
19 of your blogging?

20 A. Yes.

21 MR. CURLEY: Objection, your Honor, we need a  
22 foundation here.

23 THE COURT: Well, was there anything that happened as  
24 a result of your blogging?

25 MR. CURLEY: Personal knowledge, speculation.

1                   THE COURT: Yes. So, if the witness has personal  
2 knowledge, is there something else that happened in 2013 as a  
3 result of the blogging, you may answer the question.

4 BY MR. LEO:

5 Q. Did something happened in 2013, as a result of your  
6 blogging?

7 A. Yes, three FAU administrators wrote a letter to the editor  
8 which was published in the Sun Sentinel called -- the title of  
9 the article was Why James Tracey, FAU's Conspiracy Theorist,  
10 should resign.

11 Q. Did that article have a disclaimer?

12 A. No.

13 Q. The university administrators who wrote that article didn't  
14 put a disclaimer that they weren't speaking on behalf of the  
15 university in that article?

16 A. No.

17 Q. Was this article just published in the paper or was it sent  
18 somewhere else?

19 A. It was also distributed to the colleagues of my department  
20 via their campus email boxes.

21 Q. And how do you know that?

22 A. Some of them told me.

23 Q. What happened after you found out that this letter was  
24 published and put into the mailboxes of your peers?

25 A. I'm sorry, could you restate.

1       Q. What happened after you found out that this article had  
2 been published and then put into the mailboxes of your  
3 colleagues?

4       A. I sent an email to the School of Communication and  
5 Multimedia Studies, SCMS director --

6                  *MR. CURLEY: Hearsay, your Honor.*

7                  *THE COURT: Just a moment. You can speak about you*  
8 *sent the email, you cannot speak of the content of the email.*

9                  *BY MR. LEO:*

10       Q. What was the purpose of the email?

11       A. To complain about how I was being treated and whether there  
12 was an investigation under way.

13                  *MR. LEO: Your Honor, I would like to show the witness*  
14 *Plaintiff's 58.*

15                  *THE COURT: Any objection?*

16                  *MR. CURLEY: None, your Honor.*

17                  *THE COURT: Are you seeking to admit it?*

18                  *MR. LEO: Yes, your Honor.*

19                  *THE COURT: Marked without objection.*

20                  (Whereupon Exhibit 58 was marked for evidence.)

21                  *MR. LEO: Are you seeking to publish it?*

22                  *MR. CURLEY: One moment, your Honor.*

23                  *We are fine, your Honor, a little confusion.*

24                  *MR. LEO: May I publish, your Honor?*

25                  *THE COURT: Yes.*

1 BY MR. LEO:

2 Q. Dr. Tracy, if you would turn to the page at the bottom, is  
3 this the email you testified you sent to your supervisor?

4 A. Yes, Noemi Marin.

5 Q. Could you read it for the jury?

6 A. "Dear Noemi, I am in the process of gathering information  
7 and trust you are aware that on or around Monday April 28 of  
8 this year a member of the School of Communication and  
9 Multimedia Studies, or someone with access to our suite of  
10 offices and mail room, distributed paper copies of this  
11 statement by colleagues that was published by the South Florida  
12 Sun Sentinel and Palm Beach Post." And there is a hyper link  
13 to the article.

14 Several SCMS colleagues brought the fact that copies of the  
15 letter produced from a Microsoft Word program appeared in their  
16 mailboxes. I am interested to know if, one, you are aware of  
17 and know the identity of the party who distributed the  
18 document; two, if not, what measures have been taken to  
19 identify the party that distributed the document; and, three,  
20 what disciplinary action, if any, the FAU administration  
21 intends to take against the party that distributed the  
22 document. Thank you. Sincerely, Jim."

23 Q. What was the response to this, if anything?

24 A. On the following day Noemi Marin responded with a question,  
25 I believe, and did not really address my concerns or explain or

1 lay out a road map for how this would be resolved.

2 Q. And what was your response to your supervisor?

3 A. I believe I --

4 Q. Is that the bottom of page one?

5 A. Yes. I responded that day and did not hear anything back,  
6 I don't believe, and I waited for a couple of weeks and I then  
7 sent it to Provost Alperin.

8 Q. And at the top of 58, is that your message to Vice Provost  
9 Alperin?

10 A. I don't recollect the succession of the emails. I  
11 apparently contacted Noemi Marin once more and then Linda  
12 Johnson and Provost Alperin.

13 Q. Who is Associate Dean Johnson?

14 A. Associate Dean Linda Johnson, at the time of my being at  
15 FAU on faculty, was appointed by Dean Coltman to serve as  
16 associate. Each dean has two or three associate deans to serve  
17 in administrative processes.

18 Q. Did Dean Coltman respond to the issue?

19 A. No.

20 Q. How about Diane Alperin, did Diane Alperin respond to your  
21 communications reflected in this exhibit?

22 A. No.

23 Q. Do you know if any of the individuals who wrote that  
24 article and put it in your mailbox were disciplined for doing  
25 that?

1 A. I am not aware of their being disciplined.

2 Q. Are you aware of any investigation by the university as to  
3 this incident at all?

4 A. No.

5 Q. Are you aware of any response by the university to what you  
6 reported as personal harassment?

7 A. I am not.

8 Q. Who wrote this?

9 A. Patricia Calendar, who was the chair person of the  
10 Department of History, Jeffrey Morton, who was a former interim  
11 chair of the Department of Philosophy, and Thomas Wilson,  
12 former chair of the Department of Sociology, all of those  
13 departments being in the College of Arts and Letters.

14 Q. You say these were administrators at the university at some  
15 point?

16 A. They were administrators or former administrators.

17 Q. In 2014, did you ever have any training about the outside  
18 activities policy?

19 A. No.

20 Q. Did any supervisor address any concerns that they had over  
21 your online activities in 2014?

22 A. No.

23 Q. And in 2015, was there ever any training provided to you  
24 about the outside activities policy?

25 A. No.

1 Q. Was there ever any guidance or any form of instruction  
2 about complying with this policy and how to comply with it?

3 A. No.

4 Q. Did you have any concerns about this policy, this outside  
5 employment/professional activity policy in 2015?

6 A. Yes.

7 Q. And what were those concerns?

8 A. In the latter part of the year it came to my understanding  
9 that at least one other faculty member --

10 MR. CURLEY: Objection, hearsay.

11 THE COURT: Well, you can't testify to what somebody  
12 may have told you.

13 MR. LEO: He hasn't said whether he was told  
14 something. I don't even know --

15 THE COURT: That is why I am making sure. If that is  
16 where he were going, he can't testify to that, it is a hearsay  
17 statement.

18 BY MR. LEO:

19 Q. Without saying what somebody said to you, is it possible to  
20 say what you were aware of?

21 A. If it is permissible.

22 MR. CURLEY: Objection, hearsay, your Honor, maybe we  
23 should sidebar this.

24 THE COURT: Well, if the way he learned it is through  
25 someone else who is not necessarily an administrator at FAU, it

1       would be hearsay and it can't be testified to.

2            *MR. LEO:* Your Honor, under 701 -- one moment. Your  
3       Honor, under 701, a witness can give an opinion based on the  
4       witness' perception, helpful to clearly understand the witness'  
5       testimony, and not based on scientific, technical or other  
6       specialized knowledge within the scope.

7            *MR. CURLEY:* Are you talking about expert opinions  
8       now?

9            *MR. LEO:* This is a lay witness.

10          *THE COURT:* Hearsay is hearsay. That is not a way you  
11       can get around hearsay. He can't testify about something  
12       somebody told him unless it is a party opponent or something of  
13       that nature. I hadn't heard that to be the case.

14       BY *MR. LEO:*

15       *Q.* Dr. Tracy, did you have an opinion in 2015, as to whether  
16       the policy was understood by the faculty of the university in  
17       2015?

18           *MR. CURLEY:* Objection, your Honor, you previously  
19       addressed this and ruled upon it.

20          *MR. LEO:* We are asking based upon your perception at  
21       the time.

22          *THE COURT:* What is the question?

23          *MR. LEO:* Whether he had an opinion about whether the  
24       policy was understood by other faculty members based upon his  
25       perception at the university at the time.

1                   THE COURT: What is the response?

2                   MR. CURLEY: He is asking for his opinion and his  
3 opinion will be based upon the things he heard and was told.  
4 Either is inadmissible.

5                   THE COURT: I am going to sustain the objection.

6 BY MR. LEO:

7 Q. Are you aware of anyone being confused at the university?

8                   MR. CURLEY: Same objection, your Honor.

9                   THE COURT: Again, it is learned by virtue of someone  
10 telling him that, and that would be a statement outside of  
11 the -- an outside statement that would be hearsay.

12 BY MR. LEO:

13 Q. Let's go with what you perceived as to your understanding  
14 as well.

15                  Were you confused in 2015 about the policy?

16 A. My confusion concerning the outside activities policy  
17 persisted throughout 2015.

18 Q. And was there anything that made you more confused about  
19 the policy?

20 A. Yes.

21 Q. And what was that?

22 A. There is --

23 Q. Without saying what someone told you. There will be an  
24 objection. I want to be clear.

25                  MR. CURLEY: Maybe the witness needs to be instructed

1 to speak only about himself and personal knowledge.

2                   *THE COURT:* If you want to speak about your confusion,  
3 limit your comments to your personal experiences and not those  
4 of others.

5                   *THE WITNESS:* Okay.

6                   *BY MR. LEO:*

7                   *Q.* Speaking to what you experienced on your own, what confused  
8 you in 2015 concerning the policy, if anything?

9                   *A.* I wanted to do my best to comply and I was asking the  
10 administration for clarification on the policy and how I could  
11 go about complying.

12                  *Q.* And when was the first time in 2015 you asked the  
13 administration for clarification about the policy, if you  
14 remember?

15                  *A.* In October 2015.

16                  *Q.* And how did you ask for clarification?

17                  *A.* I contacted my immediate supervisor via email because I was  
18 on paternal leave at that time after he had requested that  
19 everyone fill out what he referred to as your outside  
20 employment form, and that was on October 20th of 2015.

21                  *Q.* Let me back up.

22                  *Why did you ask for clarification?*

23                  *A.* Because I was confused and my confusion was compounded by a  
24 faculty senate meeting that took place --

25                  *MR. CURLEY:* Objection, your Honor, you previously

1         ruled upon this. This is --

2                     *THE COURT:* I have ruled on the meeting.

3         *BY MR. LEO:*

4         *Q.* Without talking about this meeting, was there something  
5         other than the meeting that confused you? You mentioned an  
6         email, I believe?

7         *A.* The email from David Williams, my immediate supervisor.

8         *Q.* Why did that email confuse you?

9         *A.* Because he had forwarded an email from Dean Coltman..

10        *Q.* Let's back up for a minute. Who is Williams, can you tell  
11        us who he is?

12        *A.* He is my immediate supervisor.

13        *Q.* Back in 2015?

14        *A.* Yes. Excuse me, in 2015 he was my supervisor.

15        *Q.* What was his title at the university?

16        *A.* Director of the School of Communication and Multimedia  
17        Studies and full professor of rhetorical studies.

18        *Q.* And what confused you about his email again?

19        *A.* He forwarded an email from Dean Coltman stating that this  
20        is a reminder for those of you who will have outside employment  
21        income, you need to fill out this form, and it was a link to  
22        the outside employment form --

23                     *MR. CURLEY:* Your Honor, best evidence, and there is  
24        no objection to these.

25                     *MR. LEO:* This is Exhibit 18 for the record.

1                   THE COURT: No objection?

2                   MR. CURLEY: None.

3                   BY MR. LEO:

4                   Q. Doctor --

5                   THE COURT: 18 is admitted without objection.

6                   (Whereupon Plaintiff Exhibit 18 was marked for evidence.)

7                   MR. LEO: May we publish, your Honor?

8                   THE COURT: Yes.

9                   BY MR. LEO:

10                  Q. Dr. Tracy, is this the email you were testifying about a  
11 moment ago?

12                  A. Yes.

13                  Q. What about the email confused you?

14                  A. The fact that the form is referred to as the outside  
15 employment form and it is referred to as such by Dean Coltman  
16 and that email was forwarded with the heading, I believe,  
17 outside employment forms to the faculty of the School of  
18 Communication and Multimedia Studies.

19                  You could see the number of faculty there by the emails in  
20 the heading.

21                  Q. So you received this email. Is this something that you  
22 would receive regularly from the university, an email like  
23 this?

24                  A. I think this is the first time we received an email  
25 prompting us or asking us to fill out outside employment forms.

1 Q. When you received this email, did you respond to the email?

2 A. I did.

3 Q. And what was your response?

4 A. I was asking for clarification on the policy, which was  
5 unclear, I think, to myself, as well as to other faculty  
6 members.

7 Q. When you asked for clarification, was it after receiving  
8 the email? How soon before you responded and requested  
9 clarification, if you remember?

10 A. I think, even though I was on paternal leave, I was still  
11 checking my email on a semi periodic basis, and I think this  
12 was probably within the course of a few days.

13 This was on a Tuesday, it was mid week, so I think I  
14 probably responded within the course of two or three days.

15 Q. When you responded requesting clarification, did you  
16 receive clarification from Director Williams?

17 A. No.

18 Q. Did Director Williams call you into the office and say  
19 let's talk about this?

20 A. No.

21 Q. Did anybody from the administration contact you and say,  
22 Dr. Tracy, we would like to help you understand this policy  
23 better or something to that effect?

24 A. No.

25 Q. What was -- what was Director Williams' response to your

1 request for clarification on this email, if you remember?

2 A. I --

3 MR. CURLEY: Hearsay, your Honor, and best evidence.

4 A. I responded to --

5 THE COURT: Just a moment. Well, didn't we take this  
6 up yesterday with Williams? Williams was responding within the  
7 scope of his employment.

8 MR. CURLEY: Right, and it is a best evidence  
9 objection.

10 THE COURT: You just want the document itself.

11 MR. CURLEY: I do.

12 THE COURT: Do you have it?

13 MR. LEO: Yes, your Honor. Give us a moment.

14 THE COURT: Okay. That is what we talked about  
15 yesterday, I can hear you.

16 MR. CURLEY: Exactly.

17 THE COURT: Certain of the exhibits we talked about,  
18 portions can come in, in the other portions, it needs to be  
19 redacted.

20 If you want to show the witness just the portion  
21 that would be otherwise admissible, but you need to make sure  
22 ultimately that which is put into evidence is only the portion  
23 that is admissible. So there would be no disagreement from  
24 counsel to have the witness just read the portion that is  
25 admissible if you don't have a redacted version to publish.

1                   MR. LEO: It is an email thread.

2                   THE COURT: I understand. Portions of the email  
3 thread, portions are admissible, portions aren't.

4                   MR. MEDGEBOW: Regarding 31 specifically -- we did go  
5 over 32. 31 we had not, there is only an incomplete objection  
6 to that, there was never any other objection.

7                   THE COURT: Is that the one that didn't have a top  
8 part?

9                   MR. MEDGEBOW: No, but I don't believe 31 was spoken  
10 about yesterday, there is an incomplete objection to it.

11                  THE COURT: Does counsel for the Defense want to look  
12 at it again and see what the issue is, if that is the only  
13 objection?

14                  MR. CURLEY: No. If your Honor has the document, you  
15 can see the issue.

16                  THE COURT: Let me make sure I get the right one.  
17 Plaintiff's 31.

18                  MR. LEO: Plaintiff's position was there is no hearsay  
19 objection made, it has been waived.

20                  THE COURT: Well, consistent with the Court's rulings  
21 yesterday, the portions of the email from Mr. Williams to  
22 Professor Tracy are permissible to be admitted. Those from  
23 Professor Tracy to Mr. Williams would not be as an out-of-court  
24 statement, hearsay.

25                  MR. LEO: Your Honor, since we did not have a redacted

1 version of this, but it does show a response from Williams, we  
2 would like the witness to read -- if it is appropriate, to let  
3 him read the portion your Honor is allowing.

4           *THE COURT:* Which portion, the top?

5           *MR. LEO:* The second part, the bottom of page one.

6           *THE COURT:* Dated October 27, 2015?

7           *MR. LEO:* Yes, through just the middle of the page.

8           *THE COURT:* Is there any objection from Defense if  
9 that is just read?

10          *MR. CURLEY:* None, your Honor, and we can work out on  
11 a break the rest of it.

12          *THE COURT:* Okay. So it is not being admitted at this  
13 point, but you could by agreement have the witness read a  
14 portion of 31 that the Court has not deemed objectionable and  
15 then if you -- once you have redacted it, if you want to seek  
16 to reintroduce the whole exhibit, even if the witness is off  
17 the stand, I am sure there shouldn't be an objection, but it  
18 will be up to you.

19          I want to be clear, right now it is not in evidence.  
20 You can take the steps and redact it and move it into evidence,  
21 but look at it and make sure it is proper.

22          *BY MR. LEO:*

23          *Q.* Dr. Tracy, if I could have you read the email from David  
24 Williams to you dated October 27, just to here, nothing more.

25          *THE COURT:* This is reading a portion of 31, correct?

1                   MR. LEO: Yes.

2                   THE COURT: Okay.

3                   THE WITNESS: This is an email dated Tuesday,  
4 October 27, 2015, 12:58 p.m. from David Williams to James  
5 Tracey. Subject Re: Annual assignment.

6                   "Jim, the conflict of interest regulations are nothing  
7 new. The October 20 email you reference had the same form as  
8 the one listed in the terms and conditions box. Here is the  
9 body of that October 20 email and I am cc'ing Dean Coltman  
10 since it is her email you have referenced."

11                  MR. LEO: For the record, he included in the email the  
12 portion where it is disciplinary reminder language.

13                  THE WITNESS: Is that something you wanted me to read?

14                  MR. LEO: No.

15 BY MR. LEO:

16 Q. For the record, that is in the middle of David Williams'  
17 response?

18 A. Yes.

19 Q. Continue with what David Williams said to you.

20 A. Dean Coltman's email cannot be read?

21 Q. No, interpretation, those two sentences.

22 A. Well, it is what is on the monitor now, October 20 email.

23 "Your interpretation of this email seems to me to add layers of  
24 things not here, and again, the form is the same, I fail to  
25 recognize any inconsistency. Your assignment as listed is

1 exactly as the one you signed previously. Please sign it at  
2 your earliest opportunity, David."

3 Q. Thank you, that is enough with that one.

4 I want to talk about what he said for a moment, starting  
5 with "your assignment as listed is exactly the same as the one  
6 you signed previously."

7 Would Director Wil -- what did Director Williams mean by  
8 that, if you know?

9 A. I already signed this electronic assignment once in 2015,  
10 must have been July or August 2015, but it was signed online  
11 once, so I didn't understand why they wanted me to sign it  
12 again.

13 Q. Can you explain this annual assignment and what this means  
14 to the jury? What is an annual assignment?

15 A. Just what it says, what is expected of the faculty member  
16 throughout the course of the academic year. My annual  
17 assignment for 2015-2016 would involve the research I was  
18 undertaking, the teaching I was doing, the courses, and the  
19 service, what service was being done.

20 Q. Walk me through. Is it a form, is it a document, this  
21 annual assignment? How is it created?

22 A. When I first came to FAU it was on paper, and you would  
23 confer with your department chair, your immediate supervisor,  
24 what are we working on, these are the courses that we prefer  
25 you teach, you might want to teach something else. They take

1 suggestions there. You are serving on this committee for the  
2 next two years, on that committee, what else might you be doing  
3 outside of the university for service.

4 And they would write it up, and that would have your  
5 research, your teaching, your service, and you look it over,  
6 and that was more or less the agreement for the year, that is  
7 something you have to fulfill.

8 So, getting the article published, teaching the courses  
9 satisfactorily, and doing the service, and so, this is  
10 something that would be given to you in your department mailbox  
11 and, you know, come in in August to begin classes, and you just  
12 sign it and return it to the administrative assistant.

13 It is a fairly pristine process.

14 Q. What changed with the process in 2015, at FAU?

15 A. Eventually, I am not sure which year, but the process went  
16 online, as so many things do, it became electronic. We had to  
17 go online and sign off on the annual assignment provided to us  
18 electronically now, password protected and so forth, whereas it  
19 was previously paper, and what was unusual this year is that  
20 there was suddenly a pop-up box, and the pop-up box had to do  
21 with the outside activities policy.

22 Q. One second, Dr. Tracy.

23 MR. LEO: Is there an objection to this? Your Honor,  
24 I would like to show the witness what is Plaintiffs 60.

25 THE COURT: Any objection?

1                   MR. CURLEY: Exhibit 60, no objections, your Honor,  
2 that is the pop-up box.

3                   THE COURT: 60 admitted without objection.

4                   (Whereupon Plaintiff Exhibit 60 was marked for evidence/)

5 BY MR. LEO:

6 Q. Dr. Tracy, is this the check box you were referring to?

7 A. Yes.

8 Q. And when was this check box put into effect at FAU?

9 A. I believe it was put into effect in the fall of 2015.

10 Q. And tell me again, you said that Director Williams asked  
11 you to submit your annual assignment again?

12 A. Yes.

13 Q. You had already submitted your annual assignment?

14 A. Exactly. I signed it electronically, must have been July  
15 or August. Like I said, it is a perfunctory process, this is  
16 what you do. This time there was this pop-up box which I  
17 didn't fully understand.

18 Q. Did Director Williams tell you any reason why you needed to  
19 go back in this time and do it this way?

20 A. He sent an email to three faculty members, one is to me,  
21 oh, there is a technical glitch so you have to sign your annual  
22 assignment electronically again.

23 Q. What happened when you saw this check box that he was  
24 asking you to check?

25 A. I looked at the wording and I was taken aback because it is

1       incorrect.

2       Q. What is not correct about it?

3       A. It states "I affirm that I am required to report any  
4       outside activity, compensated or uncompensated, and any  
5       financial interest on Florida Atlantic University's report on  
6       outside employment or professional activity."

7       Q. Is that true?

8       A. No.

9       Q. And what did you tell Dr. Williams, or Director Williams  
10      about this box after you saw it?

11      A. I inquired --

12                  MR. CURLEY: Objection, hearsay, your Honor.

13                  THE COURT: That would be hearsay.

14          BY MR. LEO:

15       Q. After you received this check box, you emailed him, you  
16      said?

17       A. Yes, my supervisor.

18       Q. Without saying what you said, did you bring the check box  
19      to his attention and your concerns with the check box?

20       A. Absolutely, yes.

21       Q. And did Director Williams alleviate any concerns about this  
22      check box being inaccurate?

23       A. No.

24       Q. How about any other supervisor from the Defendant  
25      university, did anyone else contact you or bring you into their

1 office to try to explain why this check box was inaccurate?

2 A. No.

3 Q. Did anyone try to clarify the policy for you at that time?

4 A. No.

5 Q. What was the university's response to your request for  
6 clarification in October 2015?

7 A. They disciplined me.

8 Q. Let me back up. They didn't bring you into the office to  
9 have a meeting like they did in January 2013?

10 A. No.

11 Q. Was there any attempt by the university to resolve the  
12 dispute concerning this new check box informally?

13 A. No.

14 Q. You said they disciplined you. When was that?

15 A. November 10, 2015.

16 MR. LEO: Your Honor, if you want to take a break at  
17 this time, it is almost three hours, this is a good place, I  
18 think.

19 THE COURT: Well, to be clear, you have been going  
20 almost three hours, but since lunch, we have been going since a  
21 little after one o'clock. I don't want the jury to think they  
22 have been sitting here for three hours. You have been going  
23 for two hours, 44 minutes and 54 seconds.

24 We will take a break and we will be in recess for 15  
25 minutes, so that is -- brings us to a little after

1       3:00 o'clock, with the same instructions not to discuss the  
2 case, not to do any research, not to have contact with anyone  
3 associated with the case, not to review any media about the  
4 case.

5                  You are not to discuss your testimony with anyone, and  
6 we will be back in 15 minutes.

7                  *(Thereupon, the jury leaves the courtroom.)*

8                  THE COURT: Counsel, one thing real quick, how much  
9 longer on direct, do you think?

10                 MR. LEO: I think I have about eight to ten pages  
11 left.

12                 MR. BENZION: I think he could be finished today.

13                 MR. LEO: It depends -- we could be finished today  
14 with the direct. I will try.

15                 THE COURT: We'll come back a little after 3:00, and  
16 by 5:00 you will aim to try to finish.

17                 MR. MEDGEBOW: We spoke about calling a witness out of  
18 order yesterday. I spoke with the doctor this afternoon, and  
19 he said he could come in tomorrow morning. We were hoping that  
20 was okay with the Court, to have him be able to testify, he is  
21 not available all next week.

22                 THE COURT: After direct before defense --

23                 MR. MEDGEBOW: That would be a proper time.

24                 MR. LEO: So we don't interrupt cross.

25                 THE COURT: Okay. You are objecting to the witness?

1           MS. GRIFFIN: Yes, your Honor.

2           THE COURT: We will take that up afterwards.

3           *(Thereupon, a short recess was taken.)*

4           *(Thereupon, the jury returns to the courtroom.)*

5           THE COURT: Okay, you may continue with the direct  
6 examination of Professor Tracy.

7 BY MR. LEO:

8 Q. We were talking about the discipline in November 2013.

9 A. Yes.

10 Q. Before the discipline, how many times did you try to  
11 resolve this dispute concerning the annual assignment with your  
12 supervisor, David Williams, before being disciplined?

13 A. I think four or five times. There were at least four, I  
14 believe, email exchanges, and I also sent a certified letter to  
15 Dr. Williams formally explaining my concerns with the -- the  
16 new pop-up box.

17 Q. Before November 10, 2015, how many times did you submit  
18 your annual assignment to David Williams?

19 A. Three -- excuse me, twice. Once electronically -- twice  
20 electronically.

21 Q. Let me show you what is marked 32-E-1.

22 MR. LEO: There is no objection, your Honor, to  
23 32-E-1.

24 THE COURT: I have 32-E.

25 MR. CURLEY: It is the last page of that.

1           THE COURT: You are not seeking to admit all of it,  
2 just the last part?

3           MR. BENZION: Yes, your Honor.

4           THE COURT: Could we call it 32-E.

5           MR. LEO: We call it now 32-E-1.

6           THE COURT: What is it described as?

7           MR. LEO: Attachment to October 28, 2015 email to  
8 David Williams.

9           THE COURT: It is not the email, it is the attachment?

10          MR. LEO: Yes.

11          THE COURT: Okay. That is admitted without objection.

12          MR. CURLEY: That is correct, your Honor.

13          (Whereupon Plaintiff Exhibit 32-E-1 was marked for  
14 evidence.)

15          BY MR. LEO:

16          Q. I am showing you 32-E-1, Doctor, I know it is faded, but do  
17 you recognize this document?

18          A. Yes.

19          Q. What is this?

20          A. This is my annual assignment that I previously described  
21 the process of on 2015, AY, which means academic year.

22          Q. Could you explain what this is and how this perhaps is laid  
23 out for the jury so they can understand what they are looking  
24 at?

25          A. Yes. I provided a brief overview a short while ago, and

1 so, this is an expectation and formal assignment, commitment of  
2 the faculty member in terms of their research, in terms of  
3 their teaching and their service.

4 Q. If you see on the monitor here, it says -- can you read  
5 above faculty member as chair/director?

6 A. Maybe it is better on the paper copy.

7 Q. What does it say next to chair/director?

8 A. Williams, David signed this document on October 22, 2015,  
9 at something 57 p.m.

10 Q. And what is your understanding of that, what you just read?

11 A. Well, as was the case when this process was all paper  
12 pages, the faculty member signs the document, the chair person  
13 signs the document, and then the dean signs the document, so  
14 this is on here electronically, but Dr. Williams signed this  
15 apparently on October 22.

16 Q. And your signature is next to faculty member?

17 A. Yes.

18 Q. Is that your signature?

19 A. Yes.

20 Q. And is there a date next to it?

21 A. October 28, 2015.

22 Q. And that is the date you sent the email to David Williams  
23 with this attachment?

24 A. Yes. It was October 28 or 29, but I think upon my signing  
25 the document, yes.

1       Q. So everyone is clear, did you print this and then this is  
2 something you submitted and -- sign it and submit it again?

3       A. I was on paternity leave, so I signed the document, I think  
4 I scanned it in at home and then I sent it in via email because  
5 there was a concern about me submitting my annual assignment  
6 and I had already brought these concerns over the previous week  
7 leading up to October 28, 2015, to the attention of David  
8 Williams, my supervisor, and Alexander Schonmakers, who is the  
9 administrative assistant in the media studies, about the pop-up  
10 box, and we needed to have a discussion about the pop-up box  
11 and its implications.

12      Q. So I am clear, did you refuse to check that box?

13      A. No.

14      Q. Can you explain?

15      A. I was asking for clarification because there are very  
16 serious implications, legal particularly, and otherwise for  
17 signing that box. Not only for me signing the box, but every  
18 faculty member at Florida Atlantic University.

19           If they sign that box they are potentially putting their  
20 head on the chopping block.

21           MR. CURLEY: We are just dealing with Mr. Tracy, I  
22 move to strike, nonresponsive.

23           THE COURT: I will sustain. Insofar as Professor  
24 Tracy can continue to testify about what he did and why you did  
25 what you did as relates to you.

1       BY MR. LEO:

2       Q. Did David Williams tell you anything that alleviated your  
3       concern about the implications of checking a box like you just  
4       described?

5       A. No.

6       Q. What would have made you comfortable in checking the box?

7       A. I worked with David for ten years, but when he came to  
8       Florida Atlantic before he was chair person, we were  
9       colleagues. We still were, he being chair person, but it was  
10      an amicable relationship with him, good terms I think for the  
11      most part, and it would have been good to sit down and talk  
12      with him concerning the box and its meaning.

13       Q. Was there anything about your blogging that concerned you  
14      about the check box?

15       A. There were issues with regard to that as well, yes.

16       Q. In 2014, were you still blogging?

17       A. I still had the blog, yes, it was operational.

18       Q. Were you blogging about Sandy Hook?

19       A. In 2014?

20       Q. Yes.

21       A. No.

22       Q. 2015?

23       A. I think off and on I may have put a post on there  
24      concerning that particular incident, but not on a regular  
25      basis, no.

1 Q. And was there ever any explanation from the supervisors  
2 that you had at FAU that by checking the box it wasn't going to  
3 be a problem for you with respect to the blogging?

4 A. Was there any clarification in that regard?

5 Q. Did your supervisor ever say to you that by checking this  
6 box it doesn't mean that your blogging is a problem?

7 A. No. I asked for clarification in that regard as well, that  
8 I would have no problem checking the box if you could provide  
9 me with a statement stating that my blogging and so forth could  
10 be exempted.

11 Q. So, your primary concern with the check box was that you  
12 felt that the university was trying to expand this policy to  
13 cover your blogging, perhaps?

14 MR. CURLEY: Objection, leading.

15 THE COURT: Sustained.

16 BY MR. LEO:

17 Q. What was your concern about the scope of the policy with  
18 respect to this check box and agreeing that it was something  
19 that your understanding of the policy wasn't?

20 A. Could you rephrase?

21 Q. Sorry.

22 You testified that you had concerns about checking the box  
23 because of your blogging?

24 A. Because of the blogging, the notoriety of the blog, and my  
25 preexisting settlement agreement.

1       Q. Were you concerned that by checking the box that the  
2 university would claim your blogging was a reportable activity?

3            MR. CURLEY: Leading.

4            THE COURT: Sustained.

5       BY MR. LEO:

6       Q. How did you think the check box related to your blogging,  
7 if at all?

8       A. Again, I was uncertain. There was concern and I needed  
9 clarification from the administration or its representatives.

10      Q. If the administration had said to you your blogging is not  
11 a reportable activity, would you have been more comfortable  
12 checking the box?

13      A. If there was something in writing to that effect, that my  
14 blogging was a non-reportable activity, yes.

15      Q. Did the university ever tell you, or any administrator at  
16 the university tell you that your blogging was not a reportable  
17 activity?

18      A. That it was a non-reportable activity, no.

19      Q. When was the first time the university told you that your  
20 blogging should be reported on the reported outside employment  
21 form, Exhibit 15?

22      A. When I was fired.

23      Q. Did Director Williams ever tell you that your annual  
24 assignment would be accepted by the university?

25      A. No.

1 Q. Did Linda Johnson -- was Linda Johnson also your supervisor  
2 at the time?

3 A. Concerning this matter, it would likely be Dean Coltman. I  
4 think Linda Johnson was primarily involved in scheduling and so  
5 forth.

6 Q. Did Dean Coltman tell you that your annual assignment which  
7 you submitted was acceptable?

8 A. No.

9 Q. I am going to show you -- I am sorry, was not acceptable?

10 A. No.

11 Q. I am going to show you what is marked Plaintiff's 33.

12 MR. LEO: Your Honor, for the record, this is not  
13 going to be introduced in full, Exhibit 33. We only want the  
14 Plaintiff to read David Williams' email dated November 2nd.

15 THE COURT: Is that without objection?

16 MR. CURLEY: It is, your Honor, and what we suggested,  
17 maybe tonight after the jury is excused, we'll clean a few of  
18 these up, and I have no objection to them providing them to the  
19 jury in the morning.

20 THE COURT: Okay. So, what I am doing is simply  
21 noting right now it is marked. It will be upon you again to  
22 make sure you move it in once you have cleaned it up, but I  
23 will allow you to have the witness read the portions that you  
24 have agreed to in Exhibit 33.

25 MR. LEO: May I approach, your Honor?

1                   THE COURT: Yes.

2 BY MR. LEO:

3 Q. Why don't you tell the jury what you are reading. Who is  
4 it from, and what date?

5 A. This is an email from David Williams to myself, cc'd to  
6 Steven Charbonneau, who is the associate director of the School  
7 of Education Multimedia, Monday, November 22, 2015, 12:10 p.m.,  
8 the subject is annual assignment.

9                   "Jim, if you have outside income, then you have to fill out  
10 the conflict of interest form. That much is clear, and that is  
11 what my email you cite said. It is not clear what the other  
12 language from the drop box references, although the, quote,  
13 targeted, unquote, activities seem to have had to do with grant  
14 commitments. Here is Diane Alperin's account: Quote, this was  
15 added to F.A.I.R. in 2014 in response, as I recall, to an audit  
16 and an issue with grant applications, unquote. It would, I  
17 assume, have been there when you signed previously. I hope  
18 that you will reconsider and sign the assignment in FAIR, and  
19 in parentheses, drop box and all. I sent" --

20 Q. Read the next line.

21 A. "I sent your pdf to the deans, but I am not optimistic that  
22 it will be accepted in lieu of acceptance of the assignment on  
23 FAIR, Dcw.

24 Q. Is the annual assignment that you sent them 32-E-1?

25 A. Yes.

1       Q. His first statement in that email --

2                  MR. CURLEY: Your Honor, I want to note one small  
3 objection, I am not sure it is appropriate now, but he missed a  
4 word in the email that I think is important to its meaning.

5                  THE COURT: All right.

6                  MR. CURLEY: The third sentence where it says, it is  
7 not as clear, the witness read it is not clear. What it says  
8 is, it is not as clear.

9                  MR. LEO: Would your Honor like me to reread it?

10                 THE COURT: That is okay, it is clarified. Once you  
11 clear it up, it will be in evidence.

12 BY MR. LEO

13 Q. Dr. Tracy, going to the first statement in Director  
14 Williams' email, he wrote "if you have outside income, then you  
15 have to fill out the conflict of interest form."

16                  When he says conflict of interest form, what is he talking  
17 about, do you know?

18 A. What is otherwise referred to as the outside employment  
19 form or the outside business form.

20 Q. When Director Williams says if you have outside income, you  
21 have to fill out a conflict of interest form, is that true?

22 A. No. For example, if someone received proceeds from  
23 gambling or investments, one would not have to fill out that  
24 outside activities form.

25 Q. Are you saying not all outside income is a reportable

1       outside activity under FAU's outside employment/professional  
2       activity policy?

3       A. It is not.

4       Q. How do you know that?

5       A. This is something that was testified to by --

6       Q. Without giving me what somebody says, is that your  
7       understanding of the policy?

8       A. Yes.

9       Q. He says that much is clear.

10                  MR. CURLEY: Your Honor, they are publishing the  
11       exhibit, it is not in evidence.

12                  MR. MEDGEBOW: I thought there was no objection.

13                  THE COURT: What is on the screen is what was read.  
14       That should be all that is on the screen.

15                  MR. CURLEY: That is fine, thank you.

16       BY MR. LEO:

17       Q. He says, "that much is clear and that is what my email you  
18       cite said. It is not as clear what the other language in the  
19       drop box references, although the target activity seems to have  
20       to do with grant commitments."

21       Did you receive a response from your Dean Coltman on  
22       November 2nd to the submission of your annual assignment?

23       A. On November 2nd?

24       Q. Yes, this day. He said he sent the pdf to your dean. Did  
25       you receive a response from Dean Coltman that day?

1 A. No.

2 Q. Did you receive a response from Dean Coltman on November  
3 3rd?

4 A. No.

5 Q. So, you didn't receive any indication on November 2nd or  
6 November 3rd that the way you had submitted your annual  
7 assignment was not acceptable?

8 A. No.

9 Q. How about November 4?

10 A. No.

11 Q. November 5?

12 A. No.

13 Q. 6?

14 A. No.

15 Q. 7?

16 A. No.

17 Q. 8?

18 A. No.

19 Q. I am going to show you what is marked 32-F. What happened  
20 when you didn't receive a response after November 2nd from  
21 David Williams before the notice of discipline?

22 A. Between November 2nd and --

23 MR. LEO: Your Honor, may I approach? I am going to  
24 show the witness 32-F.

25 THE COURT: Is there any objection?

1                   MR. CURLEY: None, your Honor.

2                   THE COURT: Are you seeking to admit it?

3                   MR. LEO: Yes.

4                   THE COURT: 32-F is admitted without objection.

5                   MR. LEO: May we publish?

6                   THE COURT: Yes.

7                   (Whereupon Plaintiff Exhibit 32-F was marked for evidence.)

8 BY MR. LEO:

9 Q. Did David Williams write you on November 9, it looks like;  
10 is that correct?

11 A. Yes. I had sent, as I mentioned previously, I sent a  
12 letter to him, a letter in writing, a paper letter by U.S. Mail  
13 on, I believe, November 2nd, and this is his response  
14 acknowledging receipt of the letter.

15 Q. You said you sent him a letter. You wrote another letter  
16 to David Williams other than his emails that we discussed?

17 A. Yes.

18 Q. And without too much detail or saying what you said, what  
19 were you conveying to David Williams in your letter?

20 A. Further clarification.

21                   MR. CURLEY: This would be hearsay, your Honor.

22                   THE COURT: Sustained.

23 BY MR. LEO:

24 Q. Were you asking David Williams for anything in your letter?

25                   MR. CURLEY: Same objection, your Honor.

1                   THE COURT: The witness can testify to what David  
2 Williams wrote to him which is the subject of 32-F.

3 BY MR. LEO:

4 Q. Why did you send a certified letter to David Williams on  
5 November 2nd?

6 A. Through the U.S. mail.

7 Q. Why?

8 A. Why?

9 Q. Why did you send -- he wrote you an email November 2nd  
10 telling you that he sent your assignment to the dean. Why did  
11 you send a certified letter that day?

12 A. Because he was nonresponsive to my concerns about the  
13 pop-up box and the fact that it had to be checked off on, one  
14 had to acknowledge this ambiguous policy.

15 Q. And when he writes "Jim, I received your letter late Friday  
16 afternoon. While your letter both unnecessary and  
17 fundamentally off base, I am sorry that I did not update you  
18 mid-week. Your pdf of your assignment was sent to the dean's  
19 office in A&L; they in turn suggested a referral to legal.  
20 Legal sent to the Provost's office and I have not heard back  
21 from them. That is the update."

22                   What happened the next day after you received this?

23 A. I received a notice of discipline from Dean Heather  
24 Coltman.

25 MR. LEO: Your Honor, at this time we introduce

1 Exhibit 35.

2 THE COURT: Any objection?

3 MR. CURLEY: No objection, your Honor.

4 THE COURT: Okay, 35 is admitted without objection.

5 MR. LEO: May we publish?

6 THE COURT: Yes.

7 (Whereupon Plaintiff Exhibit 35 was marked for evidence.)

8 BY MR. LEO:

9 Q. Dr. Tracy, I am showing you Plaintiff's Exhibit 35.

10 Is this the Notice of Discipline you received after the  
11 date of the November 9 email from Director Williams?

12 A. It was produced November 10, 2015, yes, I received it  
13 several days later by U.S. Mail. I was on paternal leave.

14 Q. Could you explain what paternal leave is?

15 A. Our son was born March 29, 2015, and at that time he must  
16 have been seven months old, so the university had an agreement  
17 with the union concerning annual leave or parental leave. My  
18 wife, Maris, who is a university librarian, moved in to  
19 administration, she was no longer in the bargaining unit, so I  
20 was granted that leave as a member of the bargaining unit and  
21 parent of our fourth child, so I was home bound in 2015.

22 Q. When you received the Notice of Discipline -- before you  
23 received the Notice of Discipline, was there any attempt by the  
24 university to resolve this issue, this dispute concerning your  
25 assignment without discipline?

1 A. No.

2 Q. So, there was no meeting with Dean Coltman prior to  
3 November 10, 2015 regarding this Notice of Discipline?

4 A. No.

5 Q. I notice in the notice here you have been accused of  
6 insubordination; is that correct?

7 A. Yes.

8 Q. And it says here you have refused to sign your revised  
9 2015-16 FAIR annual assignment. Is that true?

10 A. No.

11 Q. You signed it, right?

12 A. Yes.

13 Q. And how many times did you say you submitted it?

14 A. Twice electronically. Once in the FAIR system, and once as  
15 a fixed pdf.

16 Q. Did you also send it in your certified letter?

17 A. Yes, I did. So, three times.

18 Q. Before November 10th?

19 A. Yes.

20 Q. And she says in her letter -- this is Ms. Coltman?

21 A. Yes.

22 Q. Within 48 hours of receipt of the letter you are required  
23 to acknowledge receipt of your 2015-16 annual assignment  
24 through the FAIR system with all conditions?

25 A. All terms and conditions.

1 Q. And submit employment/activity forms for 2013-14, 14-15,  
2 and 15-16; is that correct?

3 A. Yes.

4 Q. Did anyone at the university tell you that your annual  
5 assignment would not be accepted before you received this  
6 Notice of Discipline?

7 A. No.

8 Q. And did anyone tell you that you were required to submit an  
9 outside employment activity form for any reason prior to this  
10 Notice of Discipline?

11 A. No.

12 Q. Are faculty members at the university required to submit a  
13 report of employment/activity form?

14 A. No.

15 Q. Who determines whether an activity is reportable under  
16 FAU's guidelines?

17 A. The faculty member, according to FAU guidelines.

18 Q. And prior to your discipline on November 10, 2015, had you  
19 determined whether or not your outside online activities were  
20 reportable under FAU's guidelines?

21 A. Did I determine that?

22 Q. Had you determined whether or not they were?

23 A. That is what I was seeking clarification on.

24 Q. I am asking whether you made a determination before  
25 November 10, 2015 as to whether your activities were even

1 reportable at all?

2 A. No.

3 Q. Are you saying your activities were not reportable in your  
4 view or your understanding of the policy?

5 A. Yes.

6 Q. What happened after you received this Notice of Discipline,  
7 what did you do?

8 A. I spoke to the union once again.

9 Q. And what was the union's response to the November 10 Notice  
10 of Discipline?

11 A. It was to sign the assignment once again in the FAIR system  
12 and to grieve.

13 Q. Okay. So, what did you do after you were told that?

14 A. I went ahead and once again I signed the document in the  
15 FAIR system for the second time, acknowledging the ambiguous  
16 activities policy, and I sat down and wrote a four page single  
17 spaced letter to Dean Coltman which I sent on November 22,  
18 2015, with ten or 12 attachments, explaining my particular  
19 situation, my concerns with regard also to the settlement  
20 agreement and requested further clarification and asked for the  
21 letter of discipline to be removed from my file, the  
22 November 10, 2015 letter of discipline.

23 This is how things are --

24 MR. LEO: Your Honor, I would like to show the witness  
25 Plaintiff's 36. It is an extensive document, I am only going

1 to have him read his letter that he referenced, the first four  
2 pages.

3           *THE COURT:* Any objection?

4           *MR. CURLEY:* F was removed, so there is no objection.

5           *THE COURT:* Exhibit 36, which doesn't contain  
6 attachment F, is admitted without objection.

7                     (Whereupon Plaintiff Exhibit 36 was marked for evidence.)

8           *MR. LEO:* May I approach the witness?

9           *THE COURT:* Yes.

10           *MR. LEO:* May we publish, your Honor?

11           *THE COURT:* Yes.

12           *BY MR. LEO:*

13           *Q.* Dr. Tracy, what is this exhibit?

14           *A.* This is the aforementioned four-page, single-spaced letter  
15 that I sent to Dean Coltman on the 22nd of November, 2015.

16           *Q.* Could you read the letter to the jury?

17           *A.* Yes. My home address and Dean Coltman's office address.

18 Letter on the FAU Boca Raton campus sent certified mail.

19                 "Dear Dean Coltman, I am in receipt of the Notice of  
20 Discipline dated November 10, 2015 and sent via certified mail  
21 on November 12 to my address above and received on November 20,  
22 2015. Attachment A.

23                 "The following is an effort to resolve this matter  
24 informally as provided in Article 20.1 of the UFF/FAU BOT  
25 collective bargaining agreement. Given the time constraints

1 for initiating the formal grievance procedure stipulated in  
2 Article 20, I request a response no later than December 1,  
3 2015.

4 "You have issued said document because of my unaddressed  
5 queries related to Florida Atlantic University Guidelines on  
6 conflict of interest, conflict of commitment and outside  
7 activities, including financial interests and initial refusal  
8 to electronically affix my signature to my 2015-2016 annual  
9 assignment to which acknowledgment of FAU's conflict of  
10 interest policy is compulsory.

11 "I have not yet received the necessary clarification  
12 concerning the criteria encompassed in the conflict of interest  
13 document from you or the School of Communication and Multimedia  
14 Studies chair person David Williams.

15 "I nevertheless complied with Dr. Williams' directive by  
16 printing out and physically signing the 2015-2016 annual  
17 assignment and sending a paper copy to Dr. Williams via USPS  
18 certified mail on November 1st, 2015, which is attached. Dr.  
19 Williams sent this to you and it was not acknowledged. Yet,  
20 upon receiving the November 10 Notice of Discipline I have  
21 proceeded to electronically sign the document under duress.

22 "There was no subsequent attempt by you or your staff to  
23 contact me concerning the above. You allege that College of  
24 Arts and Letters Associate Dean Linda Johnson also directed me  
25 to electronically sign my 2015-2016 annual assignment. I have

1 no record of ever having been contacted by Dean Johnson via  
2 email or otherwise concerning this matter. The only  
3 communication I have received from your office is the  
4 November 10, 2015 Notice of Discipline.

5 "The administration exhibits confusion surrounding the  
6 detailed policy encompassed in the conflict of interest  
7 document which has in turn confused me and faculty colleagues.  
8 This uncertainty is evident in the contrast between Dr.  
9 Williams' explanation and yours. For example, Dr. Williams has  
10 repeatedly maintained in email communications on the 20th of  
11 October, 27th of October, and the 2nd of November of 2015, that  
12 the conflict of interest document only applies to employees who  
13 receive remuneration for such, quote, outside activities,  
14 unquote. This was affirmed in his communication with Vice  
15 Provost Diane Alperin, also attached."

16 MR. CURLEY: Your Honor, there is a matter I need to  
17 take up with the Court before we get too far with this.

18 THE COURT: This is in evidence.

19 MR. CURLEY: One part needs to be addressed consistent  
20 with the prior ruling.

21 THE COURT: Talk to counsel first, bring it to his  
22 attention.

23 MR. LEO: Your Honor, we will address this.

24 THE COURT: You are making certain redactions to it.

25 MR. LEO: Yes, to be consistent with your Honor's

1           rulings.

2           *MR. CURLEY:* Sorry, your Honor.

3           *THE COURT:* That is okay.

4           *MR. LEO:* Is it possible for me -- I should take the  
5 exhibit from him.

6           *THE COURT:* You can keep questioning the witness while

7 --

8           *MR. LEO:* I would like to keep reading.

9           *THE COURT:* Okay.

10          *MR. LEO:* I want to redact this part.

11          *THE COURT:* Okay.

12          *MR. LEO:* Let me make sure this is okay with opposing  
13 counsel, your Honor.

14          *THE COURT:* You can proceed.

15          *MR. LEO:* Yes, your Honor.

16          *THE COURT:* Okay.

17          *THE WITNESS:* "An interpretation of this policy  
18 articulated by Dr. Williams is that including financial  
19 interests means limitation of the policy to situations where  
20 some form of remuneration is received by the FAU employee  
21 and/or the university versus enlargement to uncompensated  
22 activities. Still, as I explained to Dr. Williams via email,  
23 his explanation of the form report of outside employment or  
24 professional activity is confusing and likely misleading  
25 because said form distinguishes between such undertakings as

1 employment, in quotes, and professional activity, in quotes.  
2 Further, Article 19.2 of the collective bargaining agreement  
3 states reportable outside activity shall mean any compensated  
4 or uncompensated professional practice, consulting, teaching or  
5 research, which is not part of the employee's assigned duties  
6 and for which the university has provided no compensation,  
7 unquote.

8 "The FAU administration is demanding that employees  
9 and bargaining unit numbers attest to fully comprehending and  
10 abiding by this policy as a condition of employment. Because  
11 of this confusion and my express reservation at confirming an  
12 understanding of a policy that I do not possess, and that even  
13 the administration cannot consistently provide, I have been  
14 formally reprimanded.

15 "In your November 10, 2015 Notice of Discipline you  
16 have also requested that I file the report of outside  
17 employment or professional activity for the 2013-2014,  
18 2014-2015, and 2015-2016 academic years. You originally  
19 requested I fill out said form for 2013 in your January 28,  
20 2013 letter to me summarizing a January 18, 2013 meeting  
21 between Vice Provost Diane Alperin, United Faculty of Florida  
22 Contract Enforcement Chair Douglas Broadfield and you, which is  
23 attached.

24 "In my February 2, 2013 response to your January 28,  
25 2013 letter, I explained that my extra curricular

1 activities were constitutionally protected speech. I further  
2 stated, quote, as Dr. Douglas Broadfield and I explained to you  
3 at the meeting, and as I previously articulated in my  
4 November 19 email to Noemi Marin, this work does not constitute  
5 formal scholarship or research, although an article may at some  
6 future point provide the basis for a formal scholarly paper or  
7 journal article. In the November 19 email I state, quote, in  
8 addition to formal research, I am a biweekly contributor to --  
9 GlobalResearch.ca. I intend to develop a scholarly project  
10 deriving from a contribution there in spring, unquote within a  
11 quote.

12 "I write numerous articles that appear on my personal  
13 blog, with some shared on GlobalResearch.ca. Most of these  
14 have nothing to do with FAU or formal scholarly research, will  
15 not be designated as publications in any forthcoming annual  
16 review portfolio, and will not be used for any future promotion  
17 case.

18 "This letter was mailed to you on February 2, 2013.  
19 In that communication I included a copy of my January 18, 2013  
20 email to you in which I directed you to evidence of a  
21 disclaimer, disclaimer in quotes, on my personal blog in  
22 accordance with Article 5.3(d) of the CBA. A copy of this  
23 letter was also personally given by me to FAU Associate Dean  
24 Edward Pratt on Tuesday, August 20, 2013 at the Step 2  
25 Grievance Hearing concerning this matter. I have enclosed a

1 copy of the February 2, 2013 correspondence for your records,  
2 which is an attachment to this letter. Upon my visit to your  
3 office on November 20, 2015, I found no copy of this February  
4 2, 2013 letter in my updated personnel file.

5 "My position concerning the relationship between  
6 constitutionally protected speech" --

7 *THE COURT:* Wait. Wait.

8 *MR. LEO:* We agreed to a lesser redaction. So the  
9 record is clear, there are two lines referencing the letter,  
10 but not anything further.

11 *MR. CURLEY:* It is okay, your Honor.

12 *MR. LEO:* I apologize, your Honor.

13 *THE COURT:* Okay.

14 *BY MR. LEO:*

15 Q. Nothing that I blacked out, what is in front of you.

16 A. Okay. "My position concerning the relationship between  
17 constitutionally protected speech and academic freedom was  
18 confirmed in an April 23, 2013 letter to then FAU President  
19 Mary J. Saunders.

20 "In September 2013, shortly after its decision to reject my  
21 grievance in Step 2 of the grievance process, the FAU  
22 administration proposed a settlement agreement drawn up by  
23 university associate general counsel Lawrence Glick to remove a  
24 March 28, 2013 Notice of Discipline from my personal file --  
25 personnel is spelled incorrectly.

1       "This was offered in exchange for modification of the  
2 disclaimer on my personal blog and my refraining from using the  
3 titles, quote, professor, associate professor, or equivalent on  
4 blog posts or personal writings. Again, there is no record of  
5 this settlement agreement in my personnel file located in the  
6 dean's office.

7       "Stipulation one of this agreement reads as follows:

8           "Grievant, James Tracy, agrees not to use work title,  
9 associate professor or similar, in any of his public postings  
10 or communications unless the statements made are those of the  
11 university and prior written approval has been given. This  
12 includes all postings to his personal blogs, comments to his  
13 own or other blogs, his Twitter feed, or any other media outlet  
14 regardless if written or electronic.

15       "Stipulation five of the settlement agreement notes that,  
16 quote, this agreement and the underlying issues and facts are  
17 unique, unquote. The agreement was signed by FAU Vice provost  
18 Diane Alperin, UFF Grievance Chair Douglas Broadfield and me,  
19 also attached.

20       "I have since consistently honored and maintained each  
21 stipulation of the signed document By directing me to file  
22 current and retroactive reports of outside activity, and  
23 accordingly identify myself as FAU associate professor or  
24 similar in certain constitutionally protected activities I  
25 would likewise breach this settlement agreement, the main

1 purpose of which is to distance Florida Atlantic University  
2 from the opinions and research interest FAU administrators deem  
3 objectionable.

4 "Following from the above, the university, college and SCMS  
5 have had exhibited uncertainty and ambivalence concerning the  
6 relationship between my free speech, academic freedom, and  
7 research activities, seeking to eschew material deemed  
8 controversial by major electronic and print news media while  
9 accepting those that have garnered recognition. For example,  
10 the SCMS has announced on its website the journalism I have  
11 done that has been acknowledged by the internationally  
12 recognized media research and activist group Project Censored  
13 in two consecutive awards from the organization, 2013 and 2014,  
14 such work originally appeared on my personal blog, and  
15 subsequently at GlobalResearch.ca, the website edited by  
16 renowned University of Ottawa economics professor and  
17 political dissident Michel Chossudovsky.

18 "In fact, in my faculty profile at  
19 [www.FAU.edu/SCMStracy.php](http://www.FAU.edu/SCMStracy.php) the university publicly declares that  
20 I am, quote, a regular contributor to GlobalResearch.ca,  
21 unquote.

22 "Further, my 2015-16 annual assignment includes research  
23 projects such as Confessions of a Conspiracy Theory Professor,  
24 a chapter to be included in a forthcoming volume edited by  
25 University of Miami political science professor Joseph

1 Uscinski, published by Oxford University Press. Another  
2 project I am developing is Ruling by Crisis, a co-edited volume  
3 which will feature contributions from several academics and  
4 journalists, including former Canadian diplomat and C Berkeley  
5 Professor Peter Dale Scott, whose work over a 45 year span has  
6 examined complex events such as political assassinations and  
7 U.S. Government involvement in the global illegal drug trade.

8 "I have also recently presented research on press coverage  
9 of New Orleans District Attorney Jim Garrison's investigation  
10 of the JFK assassination at the Association for Education and  
11 Research on Mass Communication's 2014 conference that the  
12 Schmidt College of Arts and Letters highlighted in its 2014  
13 newsletter.

14 "If the FAU administration seeks to discourage this  
15 research trajectory, why is it also acknowledging the  
16 legitimacy of such work in my annual assignments and  
17 publicly affirming it on its website?

18 "Based on the above, as noted, I have electronically signed  
19 my 2015-16 annual assignment as requested by SCMS Chair  
20 Williams. Concerning reports of outside activity, I am acting  
21 to maintain the existing settlement agreement between UFF, Vice  
22 Provost Alperin and me of September 2013, developed in  
23 accordance with Article 20 of the CVA.

24 "As I have also noted, there has been considerable  
25 confusion regarding the university's policy on outside

1       activities that has in turn left other faculty members and  
2       myself confused. Faculty should not be punished for asking  
3       that the university clarify its policies. I maintain that I am  
4       being reprimanded merely for asking questions and clarification  
5       on institutional policy. Those questions remain unaddressed.  
6       I therefore request that the November 10" -- I am sorry, I am  
7       sorry.

8                     *THE COURT:* Take a moment.

9                     *THE WITNESS:* "I therefore request that the  
10      November 10, 2015 Notice of Discipline be removed from my  
11      personnel file. Sincerely, James Tracy."

12      *BY MR. LEO:*

13      *Q.* Are you okay?

14      *A.* Yes.

15      *Q.* Dr. Tracy, this is difficult, I have to ask you, did Dean  
16      Coltman remove the discipline from your file?

17      *A.* No.

18      *Q.* Did she respond to the letter on November 22, I believe you  
19      said it was sent.

20      *A.* Which letter?

21      *Q.* You sent this letter on November 22, to Dean Coltman?

22      *A.* Yes.

23      *Q.* Electronic mail, certified mail?

24      *A.* Yes.

25      *Q.* When you sent this letter, I saw you referenced Article

1       20.1?

2       A. Yes.

3       Q. That is the grievance procedure?

4       A. Yes.

5       Q. So, when you sent this letter, you were doing what your  
6       union told you to do; is that correct?

7       A. Yes.

8       Q. You were beginning the informal resolution process?

9       A. Yes.

10      Q. After November 22, any time in November, did you receive a  
11       response to this letter from Dean Coltman?

12      A. No.

13      Q. Did you receive a response to this letter from anyone from  
14       the university in November of 2015?

15      A. No.

16      Q. I want to talk for a moment about what the union's response  
17       to the Notice of Discipline was.

18            You testified earlier that the union is the one who filed  
19       grievances, right?

20      A. Yes.

21      Q. And the union advised you to grieve, check the box, right,  
22       comply and grieve?

23      A. Yes.

24      Q. And you did your part, isn't that right?

25      A. Yes.

1 Q. Did the union file a grievance in response to the  
2 November 10 Notice of Discipline?

3 A. No.

4 Q. The union didn't file a grievance after they told you to  
5 comply and to grieve?

6 A. That is correct, they did not file a grievance.

7 Q. Why not?

8 A. They sent me an email on -- I received an email from the  
9 union representative on December 1st stating that the matter  
10 was not grievable.

11 Q. That is it?

12 A. That's it, yes.

13 Q. When did Dean Coltman respond to your November 22 letter?

14 A. In December. I believe December 11.

15 Q. And before December 11, did anything happen in the media  
16 concerning your blogging?

17 A. Yes.

18 Q. And what was that?

19 A. There was an article published in the South Florida Sun  
20 Sentinel on, I believe, December 10.

21 Q. And who wrote that article?

22 A. That was written by Lenny and Veronique Pozner.

23 MR. CURLEY: Your Honor, best evidence.

24 THE COURT: Just a moment. Is the article listed as  
25 an exhibit?

1           MR. LEO: We are not introducing the -- may I have a  
2 moment?

3           THE COURT: Yes.

4           MR. LEO: One moment, your Honor, we need to get the  
5 exhibit. Your Honor, for the record, this is Exhibit 61.

6           THE COURT: Is there an objection to 61?

7           MR. CURLEY: No objection.

8           THE COURT: Are you seeking to admit it?

9           MR. LEO: Yes.

10          THE COURT: Admitted without objection.

11          (Whereupon Plaintiff Exhibit 61 was marked for evidence.)

12          BY MR. LEO:

13          Q. Doctor, I am sorry to put this in front of you, but I have  
14 to ask you, is this the article you just referenced?

15          A. Yes.

16          MR. LEO: Your Honor, may we publish?

17          THE COURT: Yes.

18          BY MR. LEO:

19          Q. What was the date of this article, Dr. Tracy?

20          A. December 10, 2015.

21          Q. Can you read the title, please?

22          A. Sandy Hook Massacre Third Anniversary: Two parents target  
23 FAU conspiracy theorist, and subtitled FAU professor James  
24 Tracy taunts Sandy Hook victims.

25          Q. I will not ask you to read any more, but you can tell us

1 what the university's -- let me back up here.

2 In this article, Dr. Tracy, you were accused of harassing a  
3 victim of Sandy Hook?

4 A. Yes.

5 Q. Did you harass a victim of Sandy Hook?

6 A. No.

7 Q. Why were you accused of harassing?

8 A. This particular individual has an organization that sent me  
9 a copyright infringement claim, sent my --

10 MR. CURLEY: Best evidence, your Honor.

11 THE COURT: Just a moment. Do you have an exhibit?

12 MR. LEO: No, your Honor.

13 MR. CURLEY: It's hearsay or let's have the document.

14 BY MR. LEO:

15 Q. Without talking about letters that were sent to you, what  
16 was your interaction with Lenny and Veronique Pozner before  
17 this article, if any?

18 A. None. I sent a letter to Mr. Pozner's non-profit  
19 organization.

20 Q. What is --

21 MR. CURLEY: Best evidence, your Honor.

22 THE COURT: Are you attempting to introduce that  
23 exhibit?

24 MR. LEO: I am merely asking about interactions, I am  
25 not asking what is in the letter.

1                   *THE COURT:* Make sure the witness does not testify  
2 about the content of the letter, just the actions he took, sent  
3 a letter.

4                   *BY MR. LEO:*

5                   *Q.* Can you state the organization that you are referring to?

6                   *A.* The Honor Network, H-O-N-O-R.

7                   *MR. CURLEY:* It was a letter sent to Mr. Pozner and he  
8 is attempting to testify who it was sent to, an organization,  
9 that would be hearsay or I ask the letter be introduced.

10                  *MR. LEO:* Your Honor, I was asking him about the  
11 organization, I was not asking what the letter said.

12                  *THE COURT:* I will overrule as long as the testimony  
13 is not about the content of the letter. Talk about if you sent  
14 the letter and to whom you sent it. The content of the letter  
15 cannot be discussed.

16                  *BY MR. LEO:*

17                  *Q.* What is the Honor organization?

18                  *MR. CURLEY:* Objection, your Honor, relevance.

19                  *THE COURT:* Sustained.

20                  *BY MR. LEO:*

21                  *Q.* Why did you send Honor a letter?

22                  *A.* Because --

23                  *MR. CURLEY:* No foundation, your Honor.

24                  *THE COURT:* I will allow the witness to testify why he  
25 sent the letter.

BY MR. LEO:

*Q.* Why did you send a letter?

A. Because of a fraudulent copyright claim against my blog.

Q. Did you harass Lenny or Veronique Pozner in any way?

A. No.

Q. Did you send Lenny Pozner and his spouse, Veronique Pozner, a letter?

MR. CURLEY: Objection, hearsay, best evidence.

*THE COURT:* I will allow it. Yes or no?

BY MR. LEO:

Q. Did you send a letter to the Pozners?

A. No.

*MR. LEO:* Exhibit 34.

*MR. CURLEY:* No objection.

MR. LEO: We would like to admit 34 and publish.

*THE COURT:* Admitted without objection.

(Whereupon Plaintiff Exhibit 34 was marked for evidence.)

BY MR. LEO:

Q. Dr. Tracy, what is Exhibit 34?

A. This is the aforementioned email from Dean Heather Coltman to myself and David Williams, dated Friday, December 11, 2015, 7:09 p.m.

Q. I will ask you some questions about the specifics of this.

She says, "Dear Dr. Tracy, I am in receipt of your letter of November 22, 2015 in response to your reprimand and I

1 reviewed the arguments you presented relating to reporting  
2 outside activity, research assignment, free speech and academic  
3 freedom. I am writing to reiterate clearly that you must file  
4 a report of outside employment and outside activity form for  
5 2013-14, 14-15, 15-16, as required by university policy,  
6 Article 19 of the UFF/FAU BOT collective bargaining agreement,  
7 and as directed by me in my Notice of Discipline dated  
8 November 20, 2015. This is not optional."

9 Let me stop right there.

10 Is there anything incorrect about this letter that you  
11 notice?

12 A. She is requesting this documentation which is unnecessary  
13 for a non-reportable activity.

14 Q. When she says you must file a report of outside employment  
15 or professional activity form, is that true or false?

16 A. That is false.

17 Q. When she says the date of her Notice of Discipline is  
18 November 20, 2015, is that true or false?

19 A. That is false.

20 Q. She says, "because you claim that you were confused and I  
21 have now addressed that" -- let me stop there.

22 Did Dean Coltman address your confusion in this  
23 communication?

24 A. No.

25 Q. In this letter that she wrote you?

1 A. No.

2 Q. And when was this sent to you according to this email?

3 A. The early evening of Friday, December 11, 2015.

4 Q. Is that 7:09 p.m.?

5 A. Yes.

6 Q. Is that when you read this email and received it?

7 A. Yes -- excuse me, I was on parental leave at the time and

8 so, I did not receive it until several days later.

9 Q. So, you did not receive it on December 11?

10 A. No.

11 Q. You didn't read it on December 11?

12 A. No.

13 Q. When did you read it, if you remember?

14 A. I received the email and opened the email on the evening of

15 Tuesday, December 15.

16 Q. What was the deadline she provided?

17 A. Monday, December 14, at five o'clock p.m.

18 Q. So she sent you this response to your November 22 letter on

19 December 11, and then gives you a deadline, that is --

20 December 11 was a Friday?

21 A. Yes.

22 Q. 7:00 p.m. she gives you a deadline of Monday, the next

23 business day?

24 A. Yes.

25 Q. To submit forms that you did not believe you had to submit?

1       A. Correct.

2       Q. What did you do when you read this email and received it?

3       A. Well, I was still confused. I was upset and I've got four  
4       children, I have a mortgage. I certainly did not want to face  
5       suspension or termination, so I filled out the forms and I  
6       submitted them even though I was not quite sure how to go about  
7       filling them out.

8                    MR. LEO: Your Honor, I would like to show the  
9 Plaintiff Exhibit 42-A.

10                  THE COURT: Any objection?

11                  MR. CURLEY: No objection.

12                  THE COURT: Are you seeking to have them admitted?

13                  MR. LEO: Yes and publish.

14                  THE COURT: Admitted without objection.

15                  (Whereupon Plaintiff Exhibit 42-A was marked for evidence.)

16 BY MR. LEO:

17       Q. Dr. Tracy, I am showing you 42-A. Do you recognize this  
18 document?

19       A. Yes.

20       Q. And what is this?

21       A. This is the email -- my email responses to Dean Coltman the  
22 night of December 15th of 2015, along with the attachments.

23       Q. So the email on the bottom of page one here was the first  
24 response that you sent to Dean Coltman in response to the  
25 December 11 email?

1 A. Yes.

2 Q. You write "Dear Dean Coltman, as you are aware, I am on  
3 paternity leave and do not check my email on a regular basis.  
4 I just received your email this evening, December 15. I will  
5 submit the requested materials to you by December 16."

6 It is your testimony when she sent you this final warning  
7 on December 11, you were still confused about the policy?

8 A. Yes.

9 Q. Dean Coltman had not provided you with clarification at  
10 that point?

11 A. No.

12 Q. Director Williams had not provided you with clarification  
13 on the policy at that point?

14 A. No.

15 Q. Diane Alperin had not provided you clarification about the  
16 policy?

17 A. No.

18 Q. Prior to December 11, when you get your final warning, had  
19 you ever been notified by the university that you could be  
20 terminated for not turning in an outside employment form for  
21 your blog?

22 A. At which time?

23 Q. At any time prior to December 11.

24 A. No.

25 Q. Nobody at the university said, Dr. Tracy, if you don't turn

1       in this form for your blog you are going to be fired?

2       A. No one said that, no.

3       Q. On December 15, when you received and read Dean Coltman's

4       December 11 email, does this email at the top reflect that you

5       sent the forms that you filled out that day, that same night?

6       A. Yes. Within, I believe, an hour and 15 minutes.

7       Q. Now I would like to turn your attention to the forms.

8               They were attached to that email?

9       A. Yes.

10      Q. I see this first form says at the top, 2013-14.

11               Did you fill out this form?

12      A. Yes.

13      Q. Did anybody help you fill out this form from the

14       university?

15      A. No. I just -- I found it on the university website and sat

16       down and attempted to fill it out as best I could.

17      Q. I see you wrote on this form, 2013-14, GlobalResearch.ca as

18       name of employer activity?

19      A. Yes.

20      Q. Are you employed -- were you employed by GlobalResearch.ca

21       in 2013 or 2014?

22      A. No.

23      Q. I see you checked other professional activity underneath

24       proposed employment activity?

25      A. That was the only category that was remotely suitable.

- 1 Q. When you say remotely suitable, what do you mean?
- 2 A. Because it is not professional activity I am doing there.
- 3 Q. As we discussed earlier in your testimony, has the
- 4 university ever defined professional activity?
- 5 A. No.
- 6 Q. So, would you agree that you shouldn't have checked this
- 7 box?
- 8 A. I should not have, but once again, I was confused and under
- 9 duress, under the threat of possible termination.
- 10 Q. And why did you check the box? Why did you fill out this
- 11 form and turn it in?
- 12 A. This is something that was being requested.
- 13 Q. You were trying to resolve this?
- 14 A. Yes.
- 15 Q. Go to the next form.
- 16 Before we go to the next one, let me talk about this one
- 17 right here.
- 18 Can you read what it says there under one? It is a little
- 19 small. Do you see my green?
- 20 A. Articles of media criticism and analysis.
- 21 Q. Before that, what does number one say?
- 22 A. Description of employment activity.
- 23 Q. Articles of media criticism and analysis, is that an
- 24 employment activity for you with respect to Global Research?
- 25 A. No.

1 Q. Let's go to the next form. At the top it says 2014-15.

2 Again, GlobalResearch.ca for name of employer activity?

3 A. Yes.

4 Q. Is that because you were confused?

5 A. Yes.

6 Q. Did you check other professional activity because you were  
7 confused about this form?

8 A. Yes.

9 Q. And the same thing with description of employment activity  
10 under number one here. You wrote the same thing?

11 A. Essentially, yes.

12 Q. And again, producing articles on media criticism and  
13 analysis is not an employment activity of yourself with respect  
14 to GlobalResearch.ca?

15 A. No.

16 Q. Again, in 2014 or 2015, did you ever receive compensation  
17 from GlobalResearch.ca for anything?

18 A. No.

19 Q. Had you ever been employed by GlobalResearch.ca?

20 A. No.

21 Q. In any facet?

22 A. No.

23 Q. Let's go to the next one. This one says 2015-16. Again,  
24 you did the same thing on this form, right?

25 A. Yes.

1 Q. And that is because you were confused?

2 A. Yes.

3 Q. In 2015 or 2016, were you ever employed by  
4 GlobalResearch.ca?

5 A. No.

6 MR. CURLEY: Your Honor, I have let him lead for  
7 awhile here, but I would object to the ongoing leading  
8 questions.

9 THE COURT: All right. Try not to be leading in your  
10 questions.

11 BY MR. LEO:

12 Q. Down here where it says will classes be missed, do you see  
13 that?

14 A. Yes.

15 Q. You wrote no, you checked no. I'm sorry, what did you  
16 check? I apologize, your Honor.

17 A. No.

18 Q. Have you ever missed class for any online activity that you  
19 were involved in?

20 A. No.

21 Q. Like blogging?

22 A. Teaching class?

23 Q. Sure.

24 A. No.

25 Q. Is that what this means, classes you miss, does that refer

1 to your teaching classes?

2 A. Yes.

3 Q. Did you ever miss class because of an online post that you  
4 were sending out to the internet?

5 A. No. No.

6 Q. Did you ever have any problem satisfying your time  
7 commitments at the university because of your blogging?

8 A. No.

9 Q. Did the university ever accuse you of not honoring your  
10 time commitments?

11 A. No.

12 Q. In 2013, did the university ever tell you that your  
13 blogging is interfering with your job?

14 A. No.

15 Q. In 2014, did the university ever tell you, or any  
16 administrator of the university tell you that your blogging is  
17 conflicting with your time commitment as a professor at the  
18 university?

19 A. No.

20 Q. How about 2015, did anybody ever tell you in 2015, from the  
21 Defendant university administration, Dr. Tracy, you are not  
22 satisfying your job duties and obligations?

23 A. No.

24 Q. Let's go to the next one. The next form you submitted, it  
25 says here --

1 A. 2014, 2015.

2 Q. Okay. And what did you write for name of employer  
3 activity?

4 A. Truth Frequency Radio.

5 Q. What is Truth Frequency Radio?

6 A. The internet outlet that carries the podcasts.

7 Q. That is where the MP3's were?

8 A. Yes.

9 Q. And that was connected with your blog, the podcast?

10 A. Yes.

11 Q. The Truth Frequency, were you employed by Truth Frequency  
12 in 2014 or 2015?

13 A. Completely volunteer.

14 Q. Did you ever receive any compensation whatsoever for your  
15 podcasting?

16 A. No.

17 Q. And again, what did you check under proposed employment  
18 activity?

19 A. Other professional activity.

20 Q. Why did you check other professional activity if this  
21 wasn't a professional activity?

22 A. Once again, I was confused, seemed like the most  
23 appropriate thing to check even though it was incorrect.

24 Q. Can you read for the jury what you wrote for description of  
25 employment activity here?

- 1 A. Produce weekly current affairs program.
- 2 Q. Is that what you were doing in the podcasts?
- 3 A. Yes.
- 4 Q. You are talking about current affairs?
- 5 A. Yes.
- 6 Q. Can you explain a little bit about what your podcasts  
7 entailed?
- 8 A. It involved an interview with authors of books, doctors,  
9 attorneys, bloggers, things like that, and engaging in  
10 conversation about what they were doing.
- 11 Q. So you were recording a discussion with these individuals?
- 12 A. Exactly.
- 13 Q. And then putting them online?
- 14 A. Yes.
- 15 Q. And it was free for the public to hear these?
- 16 A. Yes.
- 17 Q. Download these. What is this form?
- 18 A. This is the university equipment facilities and services  
19 form that is supposed to be filled out in conjunction with the  
20 outside activities form. So, because I was attempting to be as  
21 thorough as possible and not actually knowing where I was going  
22 with this entire process, I downloaded these and I filled them  
23 out.
- 24 Q. Up at the top here it says employee who engages in outside  
25 activities cannot normally expect to use university equipment

1 facilities and/or services. The use of the resources will be  
2 allowed only on a non-interference basis to the extent that,  
3 one, no other than normal depreciation of equipment is  
4 experienced; and two, the use of the facilities will not result  
5 in added expense to the university.

6 Dr. Tracy, did your use of university equipment depreciate  
7 the equipment that you used?

8 A. No.

9 Q. Did your use of the facilities or services result in any  
10 added expense to the university?

11 A. No.

12 Q. What were you reporting that you used here under equipment?

13 A. The desktop in my office.

14 Q. You say desktop, is that a computer?

15 A. Desktop computer, yes.

16 Q. For what activities?

17 A. Producing an MP3 file.

18 Q. Is that what you wrote here under facilities and manner in  
19 which it would be used?

20 A. Yes.

21 Q. Can you read what you wrote there for the jury under  
22 facilities that will be used?

23 A. Record, produce MP3 files weekly on garage band, which is  
24 the Apple audio software, and iTunes for broadcasting.

25 Q. And when you used your computer to record an MP3 file, your

1 podcast, did that depreciate the equipment that you were using?

2 A. No.

3 Q. Did it result in any added expense to the university?

4 A. No.

5 Q. So, why did you fill out the form?

6 A. Once again, I was confused about how to go about the

7 process.

8 Q. Let's go to the next one. Again, this is at the top here.

9 Is it 2015-16?

10 A. Yes.

11 Q. What did you write for the name of the employer activity?

12 A. Truth Frequency Radio once again.

13 Q. And this was your podcast?

14 A. Yes.

15 Q. And when it says description of employment activity, what

16 did you write?

17 A. Produce weekly current events program.

18 Q. Dr. Tracy, was this an employment activity you were engaged

19 in in 2015?

20 A. No.

21 Q. And what did you check for proposed employment activity?

22 A. Other professional activity.

23 Q. Why?

24 A. Once again, I was confused, I am not sure.

25 Q. I see you submitted another form, another university

1 equipment form?

2 A. Yes.

3 Q. Up here at the top, what is your understanding of this part  
4 of the policy, the -- with respect to university equipment?

5 A. Well, that someone -- this is specifically for use of the  
6 university equipment that would likely be apart from what I was  
7 doing or what someone would do if they were, for example,  
8 making a telephone call on their office extension or some  
9 employee updating their Facebook page, something along those  
10 lines. It is incidental, no wear and tear on the computer,  
11 software, anything along those lines.

12 Q. At any time while you were employed at FAU, did you receive  
13 training on this form, this university equipment facilities and  
14 services form?

15 A. No.

16 Q. Did your supervisors tell you if you used your computer to  
17 create an MP3 file that is something that needs to be reported  
18 and approved?

19 A. No.

20 Q. Did anybody tell you that you need to report any use of a  
21 computer to communicate online in any way?

22 A. No.

23 Q. When you wrote in here for equipment, was this the same  
24 equipment that you were referencing in the previous form?

25 A. Yes.

1 Q. The desktop computer?

2 A. Yes, the iMac.

3 Q. Is it the same computer? This isn't a different piece of

4 equipment, is it?

5 A. No, the same one.

6 Q. The two forms we showed the jury, that is the same

7 computer?

8 A. Yes.

9 Q. And can you read the description for the jury?

10 A. Record and produce MP3 files, weekly garage band and iTunes

11 for broadcast.

12 Anyone that knows the difference between Apple and the

13 Windows platform realizes that the Apple platform is much more

14 user friendly and superior all around.

15 Q. Did anybody at the university tell you you cannot use your

16 computer to record an MP3 file?

17 A. No.

18 Q. When you submitted these forms, did the dean accept these

19 forms and say you are good?

20 A. No.

21 Q. What happened?

22 A. I was fired.

23 Q. Why?

24 A. For insubordination and not turning in the forms by

25 December 14 at five o'clock p.m., because I opened up the email

1           the following day.

2           *MR. CURLEY:* Best evidence, your Honor.

3           *MR. LEO:* Exhibit 43.

4           *MR. CURLEY:* No objection.

5           *THE COURT:* No objection?

6           *MR. CURLEY:* None, your Honor.

7           *THE COURT:* 43 is admitted without objection.

8           (Whereupon Plaintiff Exhibit 43 was marked for evidence')

9           *MR. LEO:* May I publish?

10          *THE COURT:* Yes.

11          *BY MR. LEO:*

12          *Q.* Again, you submitted those forms on December 15?

13          *A.* Yes.

14          *Q.* Do you remember what time you submitted them?

15          *A.* Around 10:00 p.m.

16          *Q.* Around 10:00 p.m.?

17          *A.* Yes.

18          *Q.* And what is Plaintiff's Exhibit 43?

19          *A.* This is the letter that I received from Provost Alperin the  
20         following day by email, as well as by certified mail.

21          *Q.* Before you received this notice, did Provost Alperin, Vice  
22         Provost Alperin, did she contact you in any way?

23          *A.* No.

24          *Q.* Regarding the forms that you submitted?

25          *A.* No.

1 Q. How about Dean Coltman, did Dean Coltman say, Dr. Tracy, we  
2 need to talk to you about your forms, there is a problem with  
3 them?

4 A. No.

5 Q. Did she say you didn't comply or you need to do something  
6 else to take corrective measure to be in compliance?

7 A. No.

8 Q. Did Vice Provost Alperin tell that you there needed to be a  
9 corrective measure to make sure you were in compliance with  
10 university policy at that time?

11 A. No.

12 Q. They just fired you?

13 A. Yes.

14 Q. Or told you you were going to be fired?

15 A. Yes.

16 Q. This is a notice of proposed discipline. Is that what it  
17 says?

18 A. Correct.

19 Q. Before December 16, 2015, did anyone tell you what to put  
20 on the report of outside employment form?

21 A. No.

22 Q. Did any supervisor like David Williams -- did David  
23 Williams say you need to put your blog on the form to be in  
24 compliance?

25 A. No.

1       Q. Did Dean Coltman, did she say, Dr. Tracy, your forms are  
2 not submitted, you need to -- can you turn in this form and put  
3 your blog on there?

4       A. No.

5       Q. Did Vice Provost Alperin, did she call you in the office  
6 and say, Dr. Tracy, you need to report your blog on this form  
7 to be in compliance with university regulations?

8       A. No. There was nothing like that.

9       Q. You are saying the university never gave you an opportunity  
10 to take corrective measure and be in compliance with what they  
11 wanted; is that your testimony?

12      A. Yes.

13      Q. Going to this notice of proposed discipline -- if I could  
14 turn your attention to the second page -- actually, let's go  
15 back here. It says you refused her directive and did not  
16 submit the activity forms when required.

17           When were you required to submit an outside employment  
18 form?

19      A. I was not.

20      Q. Did the university ever tell you when you were required to  
21 submit a form for your blog?

22      A. No.

23      Q. Let's go down to next page, page two. She writes, "in  
24 addition, you remain recalcitrant with refusal to provide  
25 activity reports. In your November 22 email to the dean you

1 admitted you were engaged in activity on GlobalResearch.ca and  
2 a personal blog. You failed to submit any activity reports for  
3 the three years in question for your blog which you clearly  
4 spent time and resources maintaining and contributing to. You  
5 conflict exists for the blog activities or if university  
6 resources are being used."

7 Was this the first time, Dr. Tracy, that you were told by  
8 the university that you needed to submit a form for your blog?

9 A. Yes.

10 Q. And underneath there it says, you publicly engage in  
11 external personal activity that requires your time and effort.  
12 Disclosure and management of your outside activity is necessary  
13 and reasonable."

14 Before December 16, 2015, did anyone at the university tell  
15 you this, this statement right here, that you need to disclose  
16 your blog for management?

17 A. No.

18 Q. Did anyone tell you at the university before December 16,  
19 2015, that management of your blog by the university is  
20 necessary?

21 A. No.

22 Q. Did anyone at the university, before December 16, 2015,  
23 tell you that management of your blog is reasonable?

24 A. No.

25 Q. Do you believe that disclosure and management of the

1 personal blogging was necessary at Florida Atlantic University?  
2 A. No. It is a non-reportable constitutionally protected  
3 activity.

4 Q. Did you believe that your personal blog was protected from  
5 disclosure and management before December 16, 2015?

6 A. Yes.

7 Q. It says here you have repeatedly and willfully failed to  
8 provide administration information it needs to discharge its  
9 responsibilities.

10 Is that true or false?

11 A. False.

12 Q. When you got this now -- and you testified a moment ago or  
13 several moments ago that the union did not file a grievance in  
14 response to the November 10 Notice of Discipline, right? Was  
15 that your testimony?

16 A. Yes.

17 Q. And you testified you were told by your union rep that it  
18 was not grievable?

19 A. Yes.

20 Q. As of December 16, 2015, what did the union do?

21 A. I consulted them and they hired an attorney.

22 Q. Did you get to pick your lawyer?

23 A. Pick my lawyer?

24 Q. You said they hired you an attorney?

25 A. Yes.

1 Q. Did you get to pick him?

2 A. No.

3 Q. So they appointed you an attorney?

4 A. Correct.

5 Q. And who was that?

6 A. Thomas Johnson.

7 Q. And where was Mr. Johnson housed, where is his law practice  
8 at?

9 A. I believe Tampa.

10 Q. The union hired you a lawyer in Tampa?

11 A. Yes.

12 Q. To represent you in Boca Raton, Florida?

13 A. Yes.

14 Q. What about the other people of the union, the president, I  
15 believe you said, advised you earlier, the president of the  
16 union?

17 A. The November 10 notice was not grievable.

18 Q. Is that the one who told you that?

19 A. The chapter president at FAU, yes.

20 Q. What did he do when you brought the December 16 notice of  
21 proposed termination letter to him? Did he take any action on  
22 behalf of the union chapter in defense of this proposed  
23 discipline?

24 A. He initially stated that a grievance needed to be filed.

25 Q. And was a grievance filed by the union?

1 A. No.

2 Q. Why not?

3 A. I don't know.

4 Q. How about your lawyer that the union appointed for you, did  
5 Mr. Johnson file a grievance for you?

6 A. No.

7 Q. Why not?

8 A. He said that -- my recollection is he said he did not want  
9 to put anything on the record that would be used against us.  
10 That was his reasoning for not filing a response within the  
11 ten-day period, and as far as the grievance goes --

12 Q. Let me back up for a second. He told you --

13 A. I should -- I believe I should amend my testimony of a  
14 moment ago.

15 Q. Please, if there is something to correct --

16 A. Concerning my grievance.

17 MR. CURLEY: Objection, this is nonresponsive. We  
18 need a question here.

19 THE COURT: What is the question that you are  
20 responding to?

21 THE WITNESS: If the union filed a grievance for me  
22 initially before hiring me an attorney.

23 THE COURT: Okay, you can amend your answer.

24 BY MR. LEO:

25 Q. First, you wanted to correct your testimony. What is it

1       that you need to correct?

2       A. The grievance contractor was Doug McKennon, he was in  
3       training and not competent in his duties. He found the idea of  
4       representing me --

5                  MR. CURLEY: This is hearsay and not responsive.

6                  THE COURT: What was the question you asked him?

7                  MR. LEO: He was trying to correct his testimony. I  
8       believe he is correcting his testimony why the union did not  
9       file the grievance.

10                 THE COURT: If you have firsthand knowledge why the  
11      union did not file a grievance, you may testify to that.

12                 Let's stick with that.

13                 BY MR. LEO:

14       Q. Perhaps I could help, Dr. Tracy, without saying something  
15      that is -- this contract enforcement -- without saying what the  
16      chair said, can you tell us what the reasoning of the union was  
17      for not filing a grievance, if you know?

18       A. I don't know if I could in accordance -- stay in accordance  
19      with the rules of federal procedure because this involved an  
20      email that I saw. So -- or a number of emails that were  
21      produced.

22       Q. Had you been included on those emails that you are  
23      referring to right now?

24       A. No.

25       Q. Who were they between, the emails you are referring to?

1       A. Between the UFF FAU chapter president, Robert Soler, the  
2 grievance chair, UFF grievance chair, Doug McKennon, and  
3 service union director for state wide Michael Motes.

4       Q. Were you excluded from those emails?

5       A. Yes.

6       Q. Let me move along to the lawyer that you were talking  
7 about.

8               When the lawyer was retained by the union, it was his  
9 responsibility to represent you at that point, right?

10      A. Yes.

11      Q. And you said that your attorney -- the union lawyer I will  
12 refer to him as. The union lawyer told you that he didn't want  
13 to file a grievance. Is that what you were explaining a moment  
14 ago?

15      A. At what time?

16      Q. Let's go with -- let's back up. When was the union lawyer  
17 appointed, if you remember?

18      A. On or around December 18th of 2015.

19      Q. So, between December 18 and this deadline to respond, you  
20 say was ten days, how much time did you have to respond?

21      A. Ten days, but the university is off between December 24 and  
22 January 2nd, so the time to respond, I believe, as Mr. Curley  
23 remarked in his opening remarks, was extended for a few days.

24      Q. Did you make a decision not to respond to the university's  
25 proposed notice of proposed discipline dated December 16?

1 A. I was following the advice of counsel.

2 Q. I say -- I am saying, did you tell your lawyer in December  
3 of 2015, don't respond to the December 16 notice of proposed  
4 termination?

5 A. No. Absolutely not.

6 Q. Did you believe there was going to be a response filed by  
7 your attorney?

8 A. Yes.

9 Q. And when no response was filed, what happened?

10 A. Well, for one, FAU was able to go to the media and state  
11 that I was negligent and did not file the response within the  
12 ten days time. I was expecting --

13 Q. Aside from that, was there a result of not responding?

14 A. Yes.

15 Q. And what was the result?

16 A. Termination.

17 Q. Like a default?

18 A. Yes.

19 MR. LEO: One moment, Dr. Tracy. I would like to show  
20 and introduce Plaintiff's Exhibit 46.

21 THE COURT: Any objection?

22 MR. CURLEY: No objection.

23 THE COURT: Are we nearing the end of the testimony?

24 MR. LEO: Very close.

25 THE COURT: Okay. 46 is admitted without objection.

1 (Whereupon Plaintiff Exhibit 46 was marked for evidence.)

2                   MR. LEO: Your Honor, I was notified that there are a  
3 few more areas. I don't think it will be too long.

4 I'll go through the exhibit and try to move things  
5 along.

6 | BY MR. LEO:

7 Q. Dr. Tracy, I am showing you what is marked Plaintiff's  
8 Exhibit 46. Is this the termination notice that you received  
9 after there was no response filed by your lawyer?

10 A. Yes.

11 Q. And what happened after you received this notice of  
12 termination; did you contact your lawyer?

13 A. Yes.

14 Q. And what did you ask your lawyer, your union lawyer?

15 A. I -- among other things, I think I was concerned with why  
16 there wasn't a response within the ten-day period or the  
17 equivalent. I was expecting for the union attorney and/or the  
18 union itself to file a response.

19 || Q. And what about --

20 A. They assured me of that.

21 || Q. Who assured you?

22 A. Michael Motes, the service unit coordinator, and my  
23 impression was Mr. Johnson, the attorney they hired for me,  
24 this was really a back burner issue for him. It was the  
25 holidays, we were going into the holiday season and this is

1 something he was going to deal with when he got back in the  
2 office. It wasn't a priority for him at this time.

3 Q. You say Michael Motes, is that the same Michael Motes that  
4 helped you write the letter in 2013?

5 A. Yes.

6 Q. And when you spoke to your attorney about the default  
7 termination, what was his response to your bringing this to his  
8 attention or your concerns about that?

9 A. He remarked shortly thereafter that -- is it possible to  
10 restate the question?

11 Q. When you brought to your union lawyer's attention that no  
12 response was filed, what was your lawyer's response to that, if  
13 you can remember?

14 A. I know that he was -- he discussed the possibility with me  
15 of filing a First Amendment lawsuit.

16 Q. What about a grievance?

17 A. No.

18 Q. Did your union lawyer tell you that you should file a  
19 grievance?

20 A. No.

21 Q. Why not?

22 A. He counseled against it. He stated that a decision by an  
23 arbitrator would hinder future legal action, a decision that  
24 might be in my favor.

25 Q. You said he advised you to file a lawsuit?

1 A. This was something that he had discussed and seemed to be  
2 interested in, yes.

3 Q. Did you file a lawsuit?

4 A. Yes.

5 Q. You followed your union lawyer's advice?

6 A. Yes.

7 Q. Going back to before your termination, did you receive  
8 evaluations as a faculty member at Florida Atlantic University?

9 A. Yes, annual evaluations, and this was something that was in  
10 conjunction with the annual assignment, one is evaluated each  
11 year on the previous year's annual assignment.

12 Q. And who prepared the evaluations for the university of your  
13 job and performance?

14 A. The form that is used for evaluating?

15 Q. Right.

16 A. There are a couple different ones. The one I am familiar  
17 with and I have been exposed to is specific to the Schmidt  
18 College of Arts and Letters.

19 Q. The annual evaluations, is it called annual faculty report?

20 A. Yes.

21 Q. Did you receive your annual faculty reports regularly at  
22 the university?

23 A. Yes.

24 Q. How often would you receive your reports for your  
25 evaluation?

1       A. Yearly. This is something that is described in the  
2 collective bargaining agreement, it has to be distributed in a  
3 timely fashion.

4       Q. And in your evaluations, was there ever any indication from  
5 your supervisors in these evaluations that you failed to honor  
6 your duties and your job?

7       A. No.

8                    *MR. LEO:* Your Honor, I would like to show and  
9 introduce Plaintiff's 29.

10          *THE COURT:* Okay. Is there any objection?

11          *MR. CURLEY:* No, your Honor. They are all reviews,  
12 right?

13          *THE COURT:* 20 is admitted without objection.

14                   (Whereupon Plaintiff Exhibit 20 was marked for evidence.)

15          *BY MR. LEO:*

16       Q. I would like you to draw your attention to the monitor, Dr.  
17 Tracy. Would you scroll down.

18                   In your termination letter you were accused of not  
19 providing the university of information if there was a conflict  
20 that existed?

21       A. Yes.

22       Q. One of the conflicts, the university accused you of  
23 depriving them of information to determine if there was a  
24 conflict of time commitment; is that right?

25       A. Yes.

1 Q. Was there ever any indication in your evaluations, your  
2 annual evaluations that you weren't honoring time commitments?

3 A. No.

4 Q. Would you publish 29.

5       Would you explain to the jury what we are looking at? This  
6 is the annual faculty report; is that correct?

7 A. Yes.

8 Q. If you go page five. This is 2011-2012?

9 A. Yes.

10 Q. Where it says summary of performance evaluations, what does  
11 it indicate for teaching?

12 A. Excellent.

13 Q. Scholarship?

14 A. Excellent.

15 Q. Service and other responsibilities?

16 A. Excellent.

17 Q. Who is it signed by? Can you tell who the people are?

18 A. Noemi Marin, my signature, and Dean Heather Coltman, who at  
19 the time was interim dean still.

20 Q. Next page. Can you explain what this is?

21 A. Yes, SCMS has a Bushnell comet, in part because it is so  
22 large, and so, this is -- it is a rotating committee, three  
23 different people on it each year alphabetically assigned, and  
24 they evaluate the work of the faculty member and propose what  
25 the rating should be for their annual report to the chair

1 person, and the chair person either approves that or  
2 scrutinizes it.

3 Q. Okay. Let's go to the next one, 2012-2013. Those are all  
4 excellent on that page; is that correct?

5 A. Yes.

6 Q. 2012-2013, go to the last page, summary of performance  
7 evaluation.

8 What is the date on there? Is that -- these are signed at  
9 different times. Is that how it works?

10 A. Yes, this looks like it was the summer of 2013, from the  
11 19th of July through early September.

12 Q. And in all those categories we covered in the last one,  
13 what was the evaluation?

14 A. It looks like they changed excellent to outstanding, same  
15 grade, outstanding.

16 Q. Could you tell me where in this annual report it says your  
17 blogging is interfering with your performance at the  
18 university?

19 A. Nowhere.

20 Q. Where does it say you haven't turned in forms for your  
21 blog?

22 A. It doesn't say anything on this document about that.

23 Q. Where does it say you don't have a disclaimer on your blog?

24 A. Nothing on this document in that regard.

25 Q. And what does it say on the next page? Can you read what

1       is here for us, Dr. Tracy?

2       A. This once again is a memo from the personnel committee to  
3       the faculty chair person and a recommended rating for each of  
4       these. Once again, these can be reconsidered by the chair  
5       person who acts as sort of a judge in this regard, but they are  
6       generally accepted.

7       Q. And Dean Coltman, she signed off on that you had an  
8       outstanding performance?

9       A. Yes.

10      Q. Go to the next one, try to speed through this. This is  
11      2013-2014?

12      A. Yes.

13      Q. Again you have all outstanding evaluations?

14      A. Yes.

15      Q. Next page. This looks like this is a report for 2014?

16      A. 2013-2014.

17      Q. This report was prepared by the university in 2014. Is  
18      that what the dates reflected are?

19      A. Yes.

20      Q. Again, all outstanding evaluations?

21      A. Yes.

22      Q. Where in the 2013-14 evaluations does it say you did not  
23      turn in your forms for your blogs?

24      A. It does not.

25      Q. Anywhere in here that says you should be submitting forms

1 for your blog?

2 A. No.

3 Q. Next one, 2014-15. That is the last page of that  
4 composite.

5 And for 15, I know this is a difference here?

6 A. Yes.

7 Q. What was the evaluation for 15, 14-15?

8 A. Both satisfactory.

9 Q. And service and other university responsibilities?

10 A. Excellent.

11 Q. Where does it say you did not turn in a form for your blog,  
12 2014-2015?

13 A. Nowhere.

14 Q. Where does it say you are required to?

15 A. Nowhere.

16 Q. Did you ever receive compensation for a book that is called  
17 Nobody Died at Sandy Hook?

18 A. Well, there was an honorarium that was discussed.

19 Q. What is an honorarium?

20 A. That is something that someone receives for some sort of a  
21 contribution.

22 Q. You say someone receives, is this academic?

23 A. Contribution -- yes, to a conference or compilation or  
24 something along those lines.

25 Q. Going back to this book Nobody Died at Sandy Hook, did you

1 write the book Nobody Died at Sandy Hook?

2 A. No.

3 Q. Who wrote that book?

4 A. This is something that was a project of Jim Fetzer and Mike  
5 Pelachek, and they contacted me and wanted to use a couple of  
6 blog posts.

7 Q. Did you actually write a chapter for that book?

8 A. The typical process in the style of the community, when  
9 someone edits a book, the editors contact you and say we are  
10 doing a book on the project, we have a prospectus, we would  
11 like something in this area, can you produce a chapter or  
12 article, and it's a couple years out to final publication, if  
13 not longer.

14 In this instance, they just extracted a couple of blog  
15 posts and put it in the book.

16 Q. You say they. Who extracted your blog posts and put it in  
17 the book?

18 A. The editors, Fetzer and Pelachek.

19 Q. Were these from your blog?

20 A. Yes.

21 Q. Which blog posts?

22 A. The ones entered into the record earlier today.

23 Q. That is Exhibit 47.

24 So, let me get this straight. Somebody else takes your  
25 blog posts from 2013, 2012, puts them in a book --

1                   MR. CURLEY: We are getting a little leading here,  
2 your Honor.

3                   THE COURT: Don't lead. Ask a non-leading question.

4 BY MR. LEO:

5 Q. The people who wrote Nobody Died at Sandy Hook -- one  
6 second, your Honor.

7                   How did your blog posts end up in those individuals' book?

8 A. I believe that I was contacted by email and they said they  
9 are working on a project and could they use a couple of pieces  
10 from the blog, and I said yes, as I recall. This was a couple  
11 of years ago.

12 Q. How many contributors or other writers were involved in  
13 this book?

14 A. Well, there were -- I am not sure if you call them  
15 contributors because it was really a composite of various  
16 things from the internet, but there were probably about ten or  
17 12 bloggers that were involved in addition to the others.

18 Q. It is alleged that you marketed this book. Did you market  
19 this book?

20 A. No.

21 Q. This book --

22 A. It is not my book, it is not my book.

23 Q. Is this an academic publication?

24 A. No.

25 Q. Why not?

1       A. Well, based on the criteria that I already pointed out this  
2 morning concerning what constitutes scholarship and the whole  
3 process through which knowledge is created, it would certainly  
4 not begin to fit those types of rigors.

5       Q. With respect to the publishers of that book, are you one of  
6 the publishers of the book?

7       A. No.

8       Q. Did you receive compensation in 2015 for that book, *Nobody*  
9 *Died at Sandy Hook*?

10      A. No.

11      Q. You said you received an honorarium. When did you receive  
12 an honorarium for the blog posts in the book?

13      A. This was in mid to late 2016.

14      Q. So, after you were fired, you received an honorarium for  
15 the contribution?

16      A. Yes.

17      Q. What was that amount?

18      A. The total amount?

19      Q. Of the honorarium.

20      A. There was -- I believe the total amount was \$800.

21      Q. And was there a reason for the honorarium?

22      A. The sales of the book and those proceeds went toward my  
23 legal defense money, and that is one of the reasons we are here  
24 today.

25      Q. And are honorariums a reportable outside activity pursuant

1 to the policy at FAU?

2 A. This would depend on the activity.

3 Q. What do you mean? Are you saying some honorariums are  
4 reportable and some aren't?

5 A. I'm not sure.

6 Q. That is because you are confused about the policy?

7 A. Yes. I remain confused even though I am no longer an  
8 employee.

9                   *THE COURT:* Counsel, how much longer?

10                  *MR. LEO:* A few more minutes.

11                  *THE COURT:* We would like to conclude the direct this  
12 evening.

13                  *MR. LEO:* I think we will, your Honor.

14                  *THE COURT:* No longer than 5:30, that is 12 minutes.

15                  *MR. LEO:* Yes, we will be finished within 12 minutes.

16                  *THE COURT:* Okay.

17                  *BY MR. LEO:*

18 Q. Does the university's outside employment policy apply to  
19 just the faculty members of the union, or does it apply to all  
20 faculty at the university?

21 A. It applies to -- FAU policy?

22 Q. Outside employment, professional activity policy.

23 A. The one the administration has developed, it applies to all  
24 employees.

25 Q. So, it is not just the collective bargaining agreement, and

1       those who are parties to that agreement?

2       A. Correct.

3       Q. You testified earlier that not all compensated activity is  
4       reportable; is that correct?

5       A. Yes.

6       Q. You said gambling is not a reportable outside activity.

7       A. Well, that is where there is confusion.

8                  MR. CURLEY: Relevance, your Honor --

9                  THE WITNESS: Because --

10                 THE COURT: Wait just a moment.

11                 MR. CURLEY: I don't think we are on gambling issues.

12                 MR. LEO: Counsel opened the door that all compensated  
13       activity is reportable.

14                 THE COURT: It has been testified to.

15                 MR. LEO: I am trying to ask another question.

16                 THE COURT: Try to wrap it up.

17                 MR. LEO: I am going to wrap up, I promise.

18                 THE COURT: Okay.

19       BY MR. LEO:

20       Q. Books, are all books reportable outside activities under  
21       the policy?

22       A. No.

23       Q. And what kind of books would be reportable?

24       A. Those that don't involve professional activity, that are  
25       not research, that are not scholarly. And so much effort, as I

1 suggested earlier, goes into a scholarly work, that is  
2 something that would typically be included on one's annual  
3 assignment. One would want to include that endeavor in that  
4 regard.

5 MR. LEO: One moment, let me confer.

6 THE COURT: Okay.

7 MR. LEO: Your Honor, we can wrap it up.

8 MR. MEDGEBOW: One moment.

9 MR. LEO: Your Honor, that will be it for now.

10 THE COURT: That is it?

11 MR. LEO: Yes.

12 THE COURT: You are complete with your direct in other  
13 words?

14 MR. LEO: Yes, your Honor.

15 THE COURT: All right.

16 MR. LEO: I apologize for going this long.

17 THE COURT: That is okay. I want to make sure you  
18 have finished your direct.

19 MR. LEO: Yes.

20 THE COURT: All right. Okay. So, ladies and  
21 gentlemen, that will conclude our day. Thank you again for  
22 your time, attention and patience. We will resume tomorrow  
23 morning at 9:00 a.m. and Professor Tracy will still be on the  
24 stand, but now it will be in the form of cross-examination by  
25 the Defense, although, as I explained in the instruction to

1 you, because he is not necessarily going to be called two  
2 times, the Defense may also then conduct direct examination of  
3 Professor Tracy, and I will let you know when that happens.

4 So, again, importantly, with the same instructions  
5 that I gave throughout the day and at the end of each day, you  
6 are free to go about doing whatever you like this evening,  
7 speaking with anyone you like, and engaging in any activities,  
8 but you are prohibited from viewing any media in this case,  
9 conducting any research at all, anything related to the case.  
10 You are not permitted to talk to anyone about the case or have  
11 contact with anyone associated with the case.

12 We hope you have a nice evening and look forward to  
13 seeing everybody back tomorrow at 9:00 a.m.

14 (*Thereupon, the jury leaves the courtroom.*)

15 THE COURT: Okay, Professor Tracy can step down. I do  
16 remind you that you remain under oath, do not discuss your  
17 testimony with anyone because it will continue until tomorrow.  
18 With that instruction.

19 Okay, we are going to try to wrap it up here. I know  
20 the Plaintiff has indicated there is an interest in calling a  
21 witness out of turn, and that witness is Steven Kajiura.

22 MR. MEDGEBOW: Yes, but before we address that, I have  
23 all of the exhibits that were introduced.

24 THE COURT: On that table there. All right. You all  
25 look like you are packing up, ready to leave. I will do the

1 same.

2 I thought there was an issue -- was there an issue  
3 about a witness being called tomorrow or have you worked that  
4 out?

5 MS. GRIFFIN: Holly Griffin, Gunster --

6 THE COURT: Is this about Steven Kajiura?

7 MS. GRIFFIN: Yes.

8 THE COURT: Succinctly.

9 MS. GRIFFIN: Dr. Kajiura is out of a different  
10 college, and the decision is by a different decision maker. He  
11 is not going to have personal knowledge relevant to the case.

12 THE COURT: That was succinct, thank you. Response.

13 MR. BENZION: We had the comparator argument, you  
14 ruled on it last night, and since -- the case law being cited  
15 is not applicable and it is a matter for weight for the jury to  
16 give to the testimony of the comparator.

17 And additionally, there is evidence in the record that  
18 there are different policies across different schools, these  
19 are university wide policies. When they are violated, they are  
20 violated and should be, according to the university's policies  
21 and procedures, handled in a consistent manner. The  
22 comparative evidence is relevant.

23 THE COURT: All right. So, I am going to overrule the  
24 objection, I will allow the witness to testify.

25 Summarizing what I touched on last evening, somewhat

1 related to the issue was the evidence of confusion, evidence of  
2 faculty members at FAU that blogged and were not disciplined or  
3 treated differently. The Court has heard argument from the  
4 Defendant why this evidence should not be admitted.

5 I know you are making particular arguments as relates  
6 to this witness, Kajiura, including, among other things, that  
7 he was in a different college, and consistent with the  
8 Defendant's overall position that he, and perhaps others, are  
9 not valid comparators.

10 As the Court indicated, it concluded that type of  
11 argument is more appropriate for cross-examination than for  
12 total exclusion of a witness. While the Defendant cited  
13 general law, and the Court analyzed the same, the Court is past  
14 the stage of evaluating Plaintiff's evidence through the lens  
15 of whether or not he has valid comparators or through the lens  
16 of the *McDonnel Douglas* framework for comparators on summary  
17 judgment.

18 We have proceeded past that stage, citing to *Gehringer*,  
19 *G-E-H-R-I-N-G, versus Case Corporation*, 43 F.3d 340, at 343,  
20 1994, quoting, "the burden shifting model of *McDonnel Douglas*  
21 applies to pretrial proceedings, not to the jury's evaluation  
22 of evidence at trial."

23 It is for the jury now to evaluate Plaintiff's  
24 evidence of others being treated differently so that the jury  
25 can decide whether or not the Defendant's basis for termination

1 was pretextual, but there will be a limit. There will be a  
2 limit how many witnesses Plaintiff may call who were not  
3 closely situated to Plaintiff insofar as they did not willfully  
4 refuse to comply with FAU policies, followed by Defendant's  
5 cross-examination as to the lack of similarity. Plaintiff is  
6 cautioned as to this point.

7           This is the first witness you are calling. I would be  
8 hard pressed to preclude him on a cumulative basis because he  
9 is the first witness presenting some testimony consistent with  
10 whatever Plaintiff is seeking to elicit.

11           I will say, however, that he must testify on matters  
12 of personal knowledge. You know enough about the Court's  
13 rulings now that everything that the Court has pronounced will  
14 apply to him insofar as what he can and cannot speak about, but  
15 importantly, there shouldn't be speculation and he shouldn't  
16 get off on different tangents. We are sticking with the core  
17 issues and, again, it has to be based on his personal  
18 knowledge.

19           So, throughout his testimony, if there are certain  
20 objections that need to be made by Defense, make them, but as  
21 to the total exclusion of him as a witness, that request is  
22 being denied.

23           So, is there any objection from Defense to taking him  
24 out of turn and have him begin tomorrow? And I will let the  
25 jury know about taking witnesses out of turn to try to

1 accommodate witnesses.

2 MS. GRIFFIN: No, no objection to that.

3 Your Honor, I did want to make one point of  
4 clarification about the arguments. Dr. Kajiura is not one of  
5 the individuals that had online activities, his was a separate  
6 and distinct factual situation. So, we would ask that  
7 Plaintiff's counsel be able to lay the proper foundation  
8 regarding those activities.

9 Dr. Kajiura, more specifically, is a marine biologist,  
10 a specialist in sharks. There was some testimony elicited out  
11 of Dr. Alperin's testimony that he was accused of being a shark  
12 killer, which would be prejudicial. His is not online  
13 activities, it is a company he was using as part of a grant.  
14 It is different than online activities.

15 MR. BENZION: Though Kajiura's activities constituted  
16 violations of the constitutional acts, they were more egregious  
17 violations of the policy, very clear violations of this policy,  
18 whereas with the Plaintiff there is obviously some -- as the  
19 Plaintiff contends, some dispute whether or not his activities  
20 were reportable. Dr. Kajiura's activities are beyond dispute  
21 reportable, and thus discipline should reflect that his  
22 activities were of that nature.

23 THE COURT: The ruling has been made. Reserve any  
24 right to make objections during the testimony, although I would  
25 remind counsel to be mindful of -- both counsel, if Plaintiff

1 sticks within the parameters of what can be elicited, I imagine  
2 there won't be any objections, and we can proceed disruption  
3 free, which I think went very well. Everyone handled today  
4 very well in terms of just having one or two sidebars and  
5 having worked everything out.

6 I do see Dr. Kajiura is short, I am anticipating you  
7 will stick to 20 minutes and 15 and 15, if even that.

8 *MR. BENZION:* That is the plan.

9 *THE COURT:* I know I said in the paperless order, in  
10 light of the exhibit objections which spans 43 pages, and in  
11 light of the amount of deposition designations, quite  
12 extensive, the Court will set aside 20 minutes at the  
13 conclusion of each trial day. The parties are to notify the  
14 Court of any witnesses called the subsequent day by deposition  
15 or exhibits that will be offered.

16 After the Court is informed, the parties may argue  
17 objections related to the deposition testimony and exhibit --  
18 the parties may not make any reference to the jury about  
19 matters that are the subject of these objections. I don't  
20 think deposition designations apply for tomorrow.

21 Is there anything looming, large or small, that we  
22 anticipate that will come up tomorrow, either with Dr. Kajiura  
23 by way of the exhibits, if any, and anything with respect to  
24 any exhibits Defense may try to introduce on  
25 cross-examination/direct examination of Dr. Tracy?

1                   MR. FEICHT: Roger Feicht. We got an email from  
2 Plaintiff's counsel this afternoon about what objections to  
3 Defendant's exhibits remain, and so I am going to go through  
4 those today and tomorrow morning to see which once we intend to  
5 introduce with Dr. Tracy. The number of objections are  
6 probably 15 to 20 remaining.

7                   There is going to be exhibits, I don't know yet, I  
8 just got that information today.

9                   THE COURT: I hope the rulings the Court has made will  
10 streamline it down to a handful. So why don't we try to  
11 convene -- I apologize, I was the one who was late today -- at  
12 8:30, and we will try to take up any of those anticipated  
13 exhibit objections that you cannot or otherwise would have  
14 resolved.

15                  We expect Kajiura tomorrow, and let's say you get  
16 through cross and direct, and Plaintiff gets through redirect  
17 and cross, is it possible we would be going on to another  
18 witness tomorrow?

19                  MR. BENZION: That is possible.

20                  THE COURT: Who will that be?

21                  MR. BENZION: It is possible, if that does happen, it  
22 will be Diane Alperin.

23                  THE COURT: And that would be live.

24                  MR. BENZION: That would be live.

25                  THE COURT: To the extent that you anticipate any

1 exhibit that would come up early on in her testimony, I  
2 encourage you to discuss those as well.

3           *MR. BENZION:* Just to clarify one point, the list I  
4 sent you earlier was not exhaustive, it was as much as I could  
5 do under the circumstances up to this point, and I told Roger  
6 Feicht. And Mr. Curley and I will be continuing to work  
7 through the evidence and objections this evening and do my best  
8 to work on resolving any remaining objections.

9           *THE COURT:* Keep in touch with each other this  
10 evening. We are ending early compared to yesterday, the night  
11 is still young. All right?

12           *MR. CURLEY:* Your Honor, one housekeeping thing.

13           Tomorrow when Dr. Kajiura testifies, we obviously want  
14 to preserve our objection, can we just say objection, prior  
15 ruling, or similarly situated?

16           *THE COURT:* Yes. It is fair to say you have a  
17 standing objection to his testimony, which is for all the  
18 reasons you have articulated, and so, I would say that any  
19 other objections that you need to make should be distinct from  
20 those that you -- your objection is on the record for the  
21 entirety of his testimony as relates to the relevancy in light  
22 of the fact that you don't believe he is a proper comparator.

23           You don't need to make that any more. If there is  
24 anything else, like hearsay or speculation or something like  
25 that, make those objections.

1           MR. CURLEY: Thank you.

2           THE COURT: Okay. You all have a good evening.

3           *(Thereupon, the court was recessed.)*

4                       \* \* \*

5           I certify that the foregoing is a correct transcript  
6 from the record of proceedings in the above matter.

7

8           Date: December 22, 2017

9                       /s/ Pauline A. Stipes, Official Federal Reporter

10                      Signature of Court Reporter

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<p><b>MR. BENZION:</b> [19] 6/4 14/23      15/2 91/8 92/13 92/15 115/5      115/8 117/11 118/4 149/11      151/2 225/12 228/14 229/7      230/18 230/20 230/23 231/2</p> <p><b>MR. BLICKENSDERFER:</b> [1]      6/22</p> <p><b>MR. 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LEO:</b> [148] 4/8 4/15 5/5      5/9 28/20 28/23 32/24 33/1      33/7 48/14 61/1 61/4 61/8      61/14 61/17 61/24 62/1 62/23      63/13 66/13 66/15 67/5 67/10      67/18 67/21 68/2 70/22 77/10      77/15 79/16 79/19 80/3 80/8      81/14 81/18 81/24 84/15      84/17 84/19 84/22 89/23 90/3      90/17 90/19 92/24 93/14      100/22 107/10 107/15 110/15      110/17 110/21 114/11 114/20      115/10 115/16 115/19 115/25      116/11 117/7 117/16 117/21      117/25 118/2 118/7 119/18      119/23 125/15 129/12 129/17      129/20 129/23 133/12 134/1      134/8 134/19 134/22 137/24      138/6 140/12 140/25 141/17      141/24 142/4 142/6 142/25      143/10 143/13 145/22 148/15      149/9 149/12 149/23 150/21      151/4 151/6 151/9 157/11      157/24 159/8 161/22 162/2      162/4 163/24 164/4 167/23      168/7 168/9 170/22 170/24      171/3 171/7 171/9 171/11      171/14 174/7 174/11 180/25      181/3 181/8 181/15 182/11</p>	<p>182/23 183/9 184/12 184/14      187/7 187/12 200/2 200/8      207/6 209/18 209/23 210/1      213/7 221/9 221/12 221/14      222/11 222/14 222/16 223/4      223/6 223/8 223/10 223/13      223/15 223/18</p> <p><b>MR. MEDGEBOW:</b> [11] 5/14      25/19 25/25 61/10 141/3      141/8 149/16 149/22 160/11      223/7 224/21</p> <p><b>MS. GRIFFIN:</b> [6] 5/1 149/25      225/4 225/6 225/8 228/1</p> <p><b>THE COURT:</b> [278]</p> <p><b>THE COURTROOM DEPUTY:</b> [1]      48/10</p> <p><b>THE WITNESS:</b> [9] 48/16      62/25 136/4 143/2 143/12      171/16 178/8 206/20 222/8</p> <hr/> <p><b>\$</b></p> <p><b>\$800</b> [1] 220/20</p> <hr/> <p>'</p> <p>'05 [1] 38/20      '10 [1] 38/25      '13 [1] 40/16</p> <hr/> <p>/</p> <p>/s [1] 232/9</p> <hr/> <p><b>1</b></p> <p>10 [21] 86/24 101/23 148/15      150/17 164/12 165/3 166/18      166/25 167/9 167/22 168/20      169/20 170/4 172/15 178/6      178/10 180/2 180/20 181/20      204/14 205/17</p> <p>10,000 [1] 29/21</p> <p>100 [1] 1/19      106 [1] 3/9      109 [1] 3/9</p> <p>10:00 p.m. [2] 200/15 200/16</p> <p>10:30 [1] 46/4      10:45 [1] 46/5</p> <p>10th [3] 49/24 59/8 165/18</p> <p>11 [16] 19/15 63/6 101/24      180/14 180/15 184/21 186/3      186/9 186/11 186/19 186/20      187/25 188/7 188/18 188/23      189/4</p> <p>112 [7] 65/25 68/8 68/10      68/12 68/16 96/2 104/3</p> <p>118 [1] 3/10</p> <p>12 [16] 3/6 49/24 53/8 67/7      67/19 67/20 67/24 68/1 68/3      68/13 101/24 167/18 168/21      219/17 221/14 221/15</p> <p>12/15 [1] 31/7      120 [1] 31/16</p> <p>128 [1] 3/10</p> <p>1280 [1] 47/10</p> <p>1282 [1] 47/10</p> <p>12:05 [1] 90/7</p> <p>12:10 p.m. [1] 158/7</p> <p>12:58 p.m. [1] 143/4</p> <p>13 [8] 3/8 30/11 100/18      100/20 100/22 101/2 101/12</p>	<p>121/8  <b>137</b> [1] 3/11  <b>14</b> [8] 59/1 166/1 185/5      186/17 189/10 189/17 199/25      216/22</p> <p><b>14-15</b> [3] 166/1 185/5 217/7</p> <p><b>140</b> [1] 54/18  <b>145</b> [1] 3/11  <b>14th</b> [2] 39/8 43/13</p> <p><b>15</b> [28] 3/8 31/7 46/15 93/11      93/13 93/14 94/6 94/15 97/8      103/4 148/24 149/6 156/21      166/1 185/5 186/15 188/4      189/3 189/6 191/1 200/12      217/3 217/5 217/7 217/7      229/7 229/7 230/6</p> <p><b>15-16</b> [2] 166/2 185/5</p> <p><b>150</b> [1] 3/12</p> <p><b>15th</b> [2] 43/14 187/22</p> <p><b>16</b> [18] 165/9 165/23 166/2      176/22 177/19 185/5 188/5      191/23 197/9 201/19 203/14      203/18 203/22 204/5 204/20      205/20 208/25 209/3</p> <p><b>16-CV-80655-ROSENBERG</b> [1]      1/2</p> <p><b>161</b> [1] 3/12  <b>163</b> [1] 3/13  <b>167</b> [1] 3/13</p> <p><b>18</b> [22] 3/11 53/11 75/1      76/13 77/4 78/17 80/13 85/11      85/19 86/10 86/12 86/16      98/21 108/5 109/10 109/15      137/25 138/5 138/6 172/20      173/19 208/19</p> <p><b>180</b> [1] 3/14  <b>183</b> [1] 3/14  <b>186</b> [1] 3/15</p> <p><b>18th</b> [4] 74/19 78/2 79/1      208/18</p> <p><b>19</b> [21] 37/8 65/24 67/3 67/8      67/14 67/21 68/19 68/24      69/22 70/18 72/12 72/21      86/24 87/5 87/9 93/25 96/1      104/8 173/4 173/7 185/6</p> <p><b>19.2</b> [3] 69/22 87/25 172/2</p> <p><b>1980</b> [1] 2/5</p> <p><b>199</b> [1] 3/15</p> <p><b>1994</b> [1] 226/20</p> <p><b>1995</b> [1] 62/19</p> <p><b>1998</b> [1] 50/3</p> <p><b>19th</b> [1] 215/11</p> <p><b>1:05</b> [2] 90/8 90/12</p> <p><b>1st</b> [2] 169/18 180/9</p> <hr/> <p><b>2</b></p> <p><b>20</b> [16] 3/16 143/7 143/9      143/22 168/21 169/2 173/24      174/3 177/23 185/8 185/18      213/13 213/14 229/7 229/12      230/6</p> <p><b>20.1</b> [2] 168/24 179/1</p> <p><b>2000</b> [1] 98/9</p> <p><b>2002</b> [6] 49/10 49/20 50/4      50/17 50/24 69/4</p> <p><b>2003</b> [3] 47/11 49/10 49/13</p> <p><b>2005</b> [1] 126/3</p> <p><b>2006</b> [1] 126/4</p>
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